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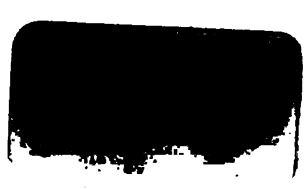

# CASES

ON THE

# LAW OF PARTNERSHIP

SELECTED

BY

FLOYD R. MECHEM

AUTHOR OF MECHEM ON AGENCY, MECHEM ON PUBLIC OFFICERS, MECHEM'S ELEMENTS OF PARTNERSHIP; EDITOR OF MECHEM'S HUTCHINSON ON CARRIERS, MECHEM'S CASES ON AGENCY, ETC.; TAPPAN PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN.

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1905

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## NOTE TO FIRST EDITION.

The following collection of cases has been made primarily for use in connection with the writer's lectures on Partnership in the Law School of this University and to accompany his "Elements of Partnership" recently published. It is hoped, however, that it may prove of value to students generally. The collection makes no pretension to being complete in any sense. What has been aimed at is to give, in small compass and inexpensive form, some illustrations of the rules governing the more important phases of the subject, and particularly to illustrate with some fullness the difficult question of the tests of partnership. Statements of facts have been condensed where practicable and portions of cases not germane to the subject have usually been omitted. Nothing has been attempted in the way of annotation beyond a reference to those sections in the text-book named where the same subject is discussed.

F. R. M.

UNIVERSITY OF MICHIGAN,
Ann Arbor, December 1, 1896.

## NOTE TO SECOND EDITION.

In this edition the number of cases has been considerably increased. The work of selecting and editing these additional cases has been almost wholly performed by Professor Sage.

F. R. M.

UNIVERSITY OF MICHIGAN,
Ann Arbor, June 15, 1903.

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# CASES ON PARTNERSHIP.

## I.

## WHAT IS A PARTNERSHIP.

### THE QUEEN vs. ROBSON.

*Crown Case reserved, 1885.*

English Law Reports, 16 Q. B. D. 137.

The prisoner was tried and convicted on an indictment framed under 31 & 32 Vict. c. 116, s. 1, charging that he, being a member of a copartnership called the Bedlington Colliery Young Men's Christian Association (hereafter called the association), feloniously did embezzle three several sums of money of and belonging to the said copartnership.

The object of the association was, to use the language of one of its printed rules, "the extension of the Kingdom of the Lord Jesus Christ among young men and the development of their spiritual life and mental powers." It was composed of members and associates. The number of members did not exceed twenty. Any person was eligible for membership "who gave decided evidence of his conversion to God," but, before he could become a member, he must be proposed and seconded by two members of the association and elected by the committee on their being satisfied as to his suitability. Trustees for the time being in whom the real property belonging to the association was vested became members by virtue of their appointment as trustees. Members were required to subscribe three shillings per annum. The affairs of the asso-

ciation were in the hands of a general committee of management, consisting of a president, two vice presidents, a treasurer, two secretaries, and at least nine members. The committee had power to suspend or expel any member whose conduct was found inconsistent in their judgment with the Christian character. The agencies for the attainment of the objects of the association were, 1st, the personal efforts of the members; 2d, devotional meetings; 3d, social meetings; 4th, classes for Biblical instruction; 5th, the delivering of addresses and lectures; and, 6th, the diffusion of Christian and other suitable literature.

Before the first of the offenses charged against the prisoner was committed, the members of the association proposed to build and afterward built a hall or place of meeting for the purposes of the association at a cost of nearly £200, of which about £40 was still owing. To this building every member had the right of entry and was entitled to a latch-key.

The prisoner became a member of the association in 1878, and had continued to be a member up to the time of the trial. As and being such member he solicited and obtained for the association from divers persons many sums of money as donations or subscriptions on account of and for the general purposes of the association, toward the building fund, and toward the liquidation of the aforesaid debt of £40. Three of these sums it was that the prisoner was charged with and found guilty of embezzling.

If the association was a copartnership within the meaning of 31 & 32 Vict. c. 116, s. 1, the conviction was to stand affirmed.[1] If it was not the conviction was to be reversed.

*Walton*, for the prisoner.

The only question is whether this association is a copartnership. The terms of the statute clearly show that the copartnerships contemplated thereby are copartnerships in the ordinary sense of the term, viz., for the

[1] 31 and 32 Vict. c. 116, s. 1, provides that "if any person being a member of any copartnership, or being one of two or more beneficial owners of any money, goods or effects, etc., shall steal or embezzle any such money, goods or effects, etc., of or belonging to any such copartnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted and punished for the same as if such person had not been or was not a member of such copartnership or one of such beneficial owners."

purpose of gain or profit. LINDLEY, L. J., in his work on Partnership, p. 1, gives an explanation of the term "partnership," which shows that the necessary idea of a partnership is that it should have for its object the acquisition and division of gain. He says: "Without attempting to define the terms 'partners' and 'partnership,' it will suffice to point out as accurately as possible the leading ideas involved in these words. The terms in question are evidently derived from *to part* in the sense of to divide amongst or share; and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement or otherwise. But, in order that persons may be partners in the legal acception of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit; . . . . to use the word 'partnership' to denote a society not formed for gain is to destroy the value of the word, and can only lead to confusion. Nor is it consistent with modern usage. Lord HALE and older writers use copartnership in the sense of co-ownership, but this is no longer customary, and, as will be shown hereafter, there are many important differences between the two." This is not an association for the purposes of profit or gain. Lord COLERIDGE, C. J. The only point reserved is whether this is a copartnership. The prisoner was not indicted as one of several joint beneficial owners.

No counsel appeared for the prosecution.

Lord COLERIDGE, C. J. It seems to me that this conviction cannot be supported. I cannot find any authority throwing any doubt on the accuracy of the passage in Lindley on Partnership, which makes the participation in profits essential to the English idea of partnership, and states that, although in former times the word "copartnership" was used in the sense of "co-ownership," the modern usage has been to confine the meaning of the term to societies formed for gain. A number of definitions given by writers from all parts of the world are appended to the passage, and in all of them the idea involved appears to be that of joint operation for the sake of gain. The association in the present case is not a copartnership in any sense of the word into which the notion of co-operation for the purpose of gain enters. We must construe the word "copartnership" as used in the act according to the meaning ordinarily attached to it by the decisions and text-books on the subject. This association does not come within that meaning. The only point reserved for us is whether this association is a copartnership within the act. Inasmuch as we are of opinion that it is not, the conviction must be reversed.

DENMAN, J. I am of the same opinion. The word "copartnership" in the act must be construed according to the well-known legal meaning of the term. If the section had only mentioned the case of a copartnership I should have thought it impossible to say that this case was within the statute. The conclusion to which we come is, in my opinion, much strengthened by the fact that the section contains another expression which covers the case of co-ownership where there is no copartnership. Here we are dealing only with the term "copartnership," for the only question reserved is whether this association was a copartnership within the section. I am clearly of the opinion that it was not.

FIELD, HAWKINS, and WILLS, JJ., concurred.

Conviction reversed.

NOTE: See Mechem's Elem. of Partn., § § 2, 7 and cases there cited.

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## BURT vs. LATHROP.

*Supreme Court of Michigan, 1883.*

52 Mich. 106, 17 N. W. Rep. 716.

Error to Wayne. Plaintiff appeals.

*C. C. Burt, in pro. per.*, and *John Atkinson*, for plaintiff and appellant.

*C. A. Kent* and *Julian G. Dickinson*, for defendants.

CAMPBELL, J. Plaintiff sued a large number of defendants as jointly liable to him for his services as attorney in defending some patent suits concerning the rights to use certain hard-rubber material in dentistry. He declared specially and with the common counts for these services, and also set up two judgments rendered in Jackson county for the same causes of action. Upon trial the court below ordered a verdict for defendants. The counts which describe the judgments do not set them out in such a way as to make out any legal liability under them against all these defendants, and the proofs are

not any more definite. It appears affirmatively that no jurisdiction existed to bind more than a part of them, and there can be nothing claimed for them under the issue as presented. They may, therefore, be laid aside. The ground for asserting a claim against the defendants jointly is that they are claimed to have become members of an association combined for the purpose of legal resistance to the claims of a patentee, and that plaintiff was employed by their officers.

There is no testimony tending to show any immediate personal employment of plaintiff by the defendants, jointly or individually, so as to justify this joint action. But it was claimed that they stood on the footing of partners, bound by the action of their designated managing members. The testimony indicates that several of the defendants, at various times, became members of an association which, so far as pertinent to this inquiry, required them to pay five dollars each into the treasury, and to pay such assessments as should be levied *pro rata*, on pain of being left out of the association and its privileges. The officers were to employ counsel, and money was to be paid on the order of the president and secretary.

We can find in this arrangement nothing analogous to a partnership. There was no common business, and nothing involving profit and loss in a business sense. No one was empowered to make contracts binding on the subscribers personally, and no one was to be liable except for assessments, nor even for those except as he saw fit to pay them to keep his membership. It was nothing more than a combination which may have made the parties in some respects responsible to each other, but which did not, we think, authorize any contract with third persons which should bind any member personally beyond his assessments. As plaintiff was not only aware of the articles, but showed that he acted under them and in furtherance of them in various ways, no question arises in the nature of an equitable estoppel. We are not concerned on this record to consider whether plaintiff has any other adequate means of securing compensation. The only question now is whether these defendants are his joint debtors. We think they are not.

The judgment must be affirmed with costs.

(The other justices concurred.)

NOTE: See Mechem's Elem. of Partn., § 7.

## DUNHAM vs. LOVEROCK.

*Supreme Court of Pennsylvania, 1893.*

156 Pa. St. 197, 27 Atl. Rep. 990, 36 Am. St. Rep. 833.

Dunham and Loverock were tenants in common of a leasehold estate in oil lands. Dunham drilled a new well in pursuance of an agreement with Loverock to that effect. Dunham claimed a balance due to him from Loverock on account of the well. In the meantime one Pickett bought Loverock's half of the property, and Dunham alleged that he and Loverock were partners, and therefore that Pickett took subject to a settlement of the accounts between Loverock and the firm. The court below held that there was no partnership and Dunham appealed.

*Roger Sherman* and *Samuel Grumbine*, for appellant.
*George S. Criswell* and *J. W. Lee*, for appellee.

WILLIAMS, J. (After stating the facts.) No contract of partnership, written or oral, is shown, but it is contended that a partnership resulted from the agreement to drill another well on the leasehold at the common cost of the owners. It must be remembered that this question is not raised between third persons and the tenants in common, but *inter sese*. What other persons may have thought, or in what manner they may have charged goods furnished for the work on the well, is not now the question; but what was the actual fact as between themselves? When the new well was proposed they were simply tenants in common of the ten acres covered by the lease, and of the well and machinery thereon. As such they contributed to the cost of operating the well, and divided the product. The new well was on the same lease. It was to the interest of each of the cotenants that it should be put down, and it was an undertaking which was appropriate to tenants in common, since it would increase the product of the common property. In the absence of a distinct agreement between them that their relations to the property and to each other should be changed, the presumption is that the old rela-

tion continued, and that they treated with each other as owners of separate interests in an undivided lease.

It is elementary law that a partnership is created only by a contract, express or implied. The burden of showing its existence is on him who alleges it, and this burden the court below rightly held had not been lifted by the plaintiff. To be sure there was undivided possession of the lease, but unity of possession is one of the distinguishing characteristics of a tenancy in common. There was contribution to the cost of operating the well, but this could be compelled between tenants in common by bill or by account render. There was division of the product, but this was in accordance with the rights of the co-tenants. Each had a right to share in the product in proportion to his interest in the estate. It may be said that there was a resulting division of profits, since, if the product exceeded the cost of production, there was a profit to each part owner; but if so it was shown by the settlement of his individual accounts only, and grew out of the fact that he received from his share of the product more than it cost him to secure it.

So it may be said there was a contribution to losses, since each tenant sustained a loss when the value of his share of the produce fell below its cost to him, but this was the individual loss of each, with which no one else had any concern, and to which no one was bound to contribute. There is, therefore, no circumstance relating to the business done upon, or the development of, the lease not fairly and naturally referable to the relations the parties sustained to each other as tenants in common. There is no agreement shown that tenants in common might not properly make with each other for the development of the property in which each held a separate title, but an undivided possession. Between persons so situated a partnership does not result by implication of law. It must be created by agreement. As we fully agree with the court below that no such agreement was shown, it is not necessary to consider the authorities cited by the learned master, and by counsel to their printed briefs, showing what are the ordinary *indicia* of a partnership. There can be no controversy over such questions in this case, for the plaintiff fails for want of proof sufficient to furnish a foothold for him on the facts. Tenants in common may become partners, like other persons, where they agree to assume that relation towards each other; but the law will not

create the relation for them as the consequence of a course of conduct and dealing naturally referable to a relation already existing between them, which made such a course of conduct to their common advantage. The plaintiff and defendants, upon the facts before us, were tenants in common.

Affirmed.

NOTE: See Mechem's Elem. of Partn., § 8, and cases there cited. See also *Coope v. Eyre post*, p. 64.

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## EATON vs. WALKER.

*Supreme Court of Michigan, 1889.*

76 Mich. 579, 43 N. W. Rep. 633.

This action was brought by Eaton against Walker, Hopkins and Livingston, to recover the sum of $3,562.68, alleged to be due from them. There was no dispute as to the amount. The defense was that the debt was contracted by and due from the corporation of Walker, Hopkins & Co., of which the defendants were the members, but which had become insolvent. Prior to the organization of Walker, Hopkins & Co., the defendant Walker, with others, had carried on a partnership business under the firm name of Walker, Summer & Co. Plaintiff had had dealings with both concerns. Hopkins and Livingston had no connection with the business of Walker, Summer & Co. Defendants had assumed to organize as a corporation under a statute purporting to authorize such organization, and had done all that was necessary to comply with the statute. Defendants Livingston and Hopkins had paid in cash for their stock, and Walker had turned in the assets of Walker, Summer & Co., of which he had become the owner. The court below found that the plaintiff had dealt with Walker, Hopkins & Co., as a corporation, and that the debt sued upon was due from the corporation as such. The plaintiff contended that the statute under which defendants had assumed to organize as a corporation was unconstitutional, because it violated the constitutional provision that "no law shall embrace more than one object, which shall be embraced in its title." The Supreme Court held the statute unconstitutional for this reason.

*Henry M. Duffield*, for plaintiff and appellant.

*Dickinson, Thurber* and *Stevenson*, and *F. H. Canfield*, for defendants.

LONG, J. (After declaring the statute unconstitutional.)

Defendants' counsel, however, insist that Walker, Hopkins & Co. were a corporation *de facto*, if not *de jure*. But there being no valid law of this State under which the defendants could legally be incorporated, could they, even colorably, become a corporation, or have any existence as a corporation *de facto*, or would the plaintiff be estopped from inquiry into their corporate existence under such circumstances? Two things are necessary to be shown in order to establish a corporation *de facto*, viz.: (1) The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law. *Bank vs. Stearns*, 15 Wend. (N. Y.) 314. If the law exists, and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required. *Methodist Church vs. Pickett*, 19 N. Y. 487. In *Heaston vs. Railroad Co.*, 16 Ind. 275, 79 Am. Dec. 430, the court says: "The estoppel goes to the mere *de facto* organization; not to the question of legal authority to make an organization. A *de facto* corporation, that by regularity of organization might be one *de jure*, can sue and be sued. And a person who contracts with such corporation while it is acting under its *de facto* organization—who contracts with it as an organized corporation—is estopped, in a suit on such contract, to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply." The same rule was laid down by implication by this court in *Swartwout vs. Railroad Co.*, 24 Mich. 393, as follows: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate, alike

of justice and of public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised." And again it was said: "But both in reason and on authority the ruling should be the same where an attempt has been made to organize a corporation under a general law permitting it. If due authority existed for the organization, and the question is one of regularity merely, 'the rule established by law, as well as reason, is that parties, recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization.'" In the present case, however, there was no law authorizing the parties to file their articles of association, or to become incorporated; and there could, under such circumstances, be no corporation *de facto*. It cannot, therefore, in any proper legal sense, be said that the carrying on of the business in the corporate name is evidence of user which can be considered in aid of their legal corporate existence.

Counsel for the defendants contend that the case of *Bank vs. Stone*, 38 Mich. 779, is decisive of this case. In that case the defendants claimed to be incorporated as the Charles Stone Timber Company. It appeared that the plaintiff transacted a large amount of business with the defendants, upon the specific understanding that the concern was contracting as a corporation, and not otherwise; and this court said: "Now, the proof that, as matter of fact, the company carried on business as a corporation in the name of the Charles Stone Timber Company when the bank dealt with it, established, *prima facie*, that it was a corporation pursuant to law; and certainly the evidence the bank adduced in regard to the operations of the company, the attitude it maintained, and the character in which the two concerns dealt together, showed that the company was a corporation *de facto*, and so acknowledged by the bank." In the present case the plaintiff offered evidence to show that he never knew, or had any information, that the defendants claimed that Walker, Hopkins & Co. were a corporation, but, on the contrary, that Mr. Walker, of that firm, asked him to continue his business with the firm as he had carried it on formerly with Walker, Summer & Co., and that the firm was composed of himself, William Livingston, Jr.,

and Mark Hopkins, Jr., and that he always believed and understood that Walker, Hopkins & Co. were a firm. This testimony the court below excluded. In addition to this, and upon this point, this case differs radically from the case of *Bank vs. Stone*. The whole facts show that the firm never had any corporate existence, and never was a corporation, even *de facto*. It is very evident to us that the facts here presented do not bring this case within the ruling of the former case. In the present case, as in that, the name would not indicate that the firm was a corporation. It gave no clue to the nature of the company as being corporated or unincorporated, and there is no pretense of proof that the plaintiff dealt with it as a corporation, except the fact that defendants were doing business as a corporation, and had published such fact in two of the Detroit papers, and mailed circulars to their customers announcing that they had organized as a corporation under the laws of the State of Michigan, and also that their letter heads showed this fact, some of the circulars being mailed to plaintiff, and the corporation having also sent by mail statements of its accounts to plaintiff written upon such letter heads. The plaintiff testified that he had no recollection of receiving such circulars, or of ever having seen such announcements in the public press. Plaintiff also testified that he had no recollection of ever having received any letter heads containing the information that defendants were a corporation; and it appears that when the account was made up by defendants showing their indebtedness to plaintiff, and transmitted to him, it was upon the letter head of Walker, Summer & Co., which did not contain any showing that Walker, Hopkins & Co. were a corporation. Plaintiff's counsel also offered to show by the testimony of the plaintiff that Mr. Walker solicited the plaintiff to do business with Walker, Hopkins & Co., stating to him that it was a partnership composed of Walker, Livingston, and Mark Hopkins, Jr., and that in the faith of that statement the plaintiff commenced business with them. This testimony the court excluded. Defendants' counsel, however, contend that inasmuch as the trial court found as a fact that Walker, Hopkins & Co. were a corporation, and that during the time it continued to do business plaintiff had full knowledge that they were a corporation, and not a copartnership, and continued to do business with them as a corporation, such finding is con-

clusive, and will not be disturbed by this court. It would be true that, if there was any proof to support the finding, this court would be bound by it, though, upon the facts, it might not be able to agree with the circuit court in its conclusions. But the fact is made to appear, by the evidence returned, that the court excluded the evidence of the plaintiff that he did not know that they were a corporation, and did not deal with them as such, but was informed by Walker that they were a partnership, and dealt with them in the belief that they were a partnership; and yet the court below finds, under the evidence which defendants were permitted to offer, that plaintiff did deal with them as a corporation, and had full knowledge that they were such, and bases such finding and conclusion upon the fact that defendants published the statements in the public press, and mailed circulars and letter heads to plaintiff which it is not shown he ever received. Under such circumstances, the court was in error in excluding the testimony, and we think there is no proof to sustain the finding.

It is undoubtedly well settled that a person who has entered into contract relations with a *de facto* corporation cannot, in an action thereon, deny its corporate character, or set up any informality in its organization, to defeat the action. The distinction between such cases and the present one is to my mind clear. If there had been any law under which defendants had a right to incorporate, and the offer had been to show a mere abuse or excess of its corporate powers, or had it appeared that it was a *de facto* corporation, and the question related to the regularity of its organization merely, there could be no doubt that the plaintiff would be estopped from questioning its corporate existence. But the two things necessary to show a corporation, even *de facto*, do not exist. There is no law under which the powers they assumed might lawfully be created; and the mere fact that they assumed to act as such, even in the full belief that they were legally incorporated, would not constitute them a corporation *de facto*.

It is admitted upon this record that an indebtedness was due to the plaintiff in the sum of $3,562.68 at the date of the trial, July 19, 1888, and plaintiff seeks to hold defendants liable therefor as partners, and in this contention we think he is right. The defendants were not a corporation. They had associated together, each sharing the profits and losses of the busi-

ness equally, according to the money each put in as capital stock, each holding and owning one-third part of the shares. The fact that they took counsel and acted in good faith in organizing under what they were advised was a valid law does not relieve them of their liability. It is well settled that obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. They have had the benefit of the plaintiff's means; they are indebted to him, as is conceded; but have sought to shift individual liability to a corporate one. There is no such corporation, and the mere fact that defendants assumed to act as such does not relieve them from personal liability. Under the circumstances of this case the defendants must be held liable as partners. The judgment of the court below must be set aside and vacated, and judgment entered here in favor of plaintiff for the sum of $3,562.68, with interest from July 27, 1883, being the date when the parties, claiming to be a corporation, made an assignment for the benefit of their creditors, together with costs of both this and the circuit court.

CAMPBELL and CHAMPLIN, JJ., concurred with LONG, J. SHERWOOD, C. J., and MORSE, J., did not sit.

NOTE: Compare with the two cases following.

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## FINNEGAN vs. NOERENBERG.

*Supreme Court of Minnesota, 1893.*

52 Minn. 239, 53 N. W. Rep. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

This was an action to recover of the defendant for the debts of a Building Association upon the ground that the association had failed to become a corporation and, therefore, the associates were liable as partners. The court below held the defendant not liable. Plaintiff appealed.

*Savage & Purdy*, for appellant.

*Ankeny & Irvin*, for defendant.

GILFILLAN, C. J. Eight persons signed, acknowledged, and

caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, c. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to $599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because—*First*, the act under which it attempted to become incorporated, to wit, laws 1870, c. 29, is void, because its subject is not properly expressed in the title; *second*, the act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; *third*, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a *quo warranto*, or an action in the nature of *quo warranto*, in behalf of the State; for, although an association may not be able to justify itself when called on by the State to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation, that, for reasons of public policy, no one but the State will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by

SELDEN, J., in *Methodist, etc., Church vs. Pickett*, 19 N. Y. 482, as "(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." This statement was apparently adopted by this court in *East Norway Church vs. Froislie*, 37 Minn. 447, 35 N. W. Rep. 260; but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally." To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the *status* of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the *status* of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson vs. Corser*, 34 Minn. 355, 25 N. W. Rep. 799, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required. "Color of apparent organization under some charter or enabling act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization the failure as to some substantial requirement will prevent the body being a corporation *de jure*; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

(The court then discussed the alleged invalidity of the act to authorize the formation of such a corporation, and held the act valid for that purpose.)

The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*. The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

Judgment affirmed.

NOTE: Compare with the preceding and following cases.

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## KAISER vs. LAWRENCE SAVINGS BANK.

*Supreme Court of Iowa, 1881.*

56 Iowa 104, 8 N. W. Rep. 772, 41 Am. Rep. 85.

Action by Kaiser against a number of persons, of whom Hoag alone was served with process to hold them liable as partners doing business as the Lawrence Savings Bank. Defense that the bank was a corporation under the laws of Kansas, and that therefore the defendant was not personally liable. Verdict for plaintiff and Hoag appeals.

*Hanna, Fitzgerald & Hughes*, for appellant.

*Hoffman, Pickler & Brown*, and *L. M. Fisher*, for appellee.

ADAMS, C. J. The evidence tends to show that certain individuals attempted in good faith to become incorporated under the laws of Kansas for the purpose of doing business as a savings bank, and subscribed for shares in the supposed corporation. For several years they did business as a savings bank, under the supposition that they were duly incorporated. Prior to the time that plaintiff became a creditor of the bank, the defendant Hoag purchased an interest in the bank, and remained the owner of such interest from that time forward. The question presented is whether the shareholders so far complied with the incorporation laws of Kansas as to become incorporated and secure an exemption from individual liability, and if they did not strictly become incorporated whether the

fact that they did business as a corporation, not only with the general public but with the plaintiff, was sufficient to secure to them exemption from individual liability.

(The court here considered the statutory requirements and held that the papers executed and filed by the shareholders were defective both in form and substance.)

The defendant insists, however, that in order to establish the corporate existence of the Lawrence Savings Bank as against plaintiff it is sufficient to show authority to create the corporation, a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation. In support of this proposition the defendant cites *The Buffalo & Allegheny Railroad Co. v. Cary,* 26 N. Y. 77. In that case the court said, "that if the papers filed are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by the acts of user under such organization it becomes a corporation *de facto,* and no advantage can be taken of such defect in its constitution collaterally by any person." Substantially the same doctrine was enunciated in *Krutz vs. The Paola Town Co.,* 20 Kan. 403, and *Pape vs. The Capitol Bank,* 20 Kan. 440, 27 Am. Rep. 182. It should be observed, however, that in those cases the defendant set up a want of incorporation of the plaintiff and sought to escape liability upon that ground. In the case at bar the defendant sets up exemption averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption.

It will be seen at once that the principle involved in those cases is essentially different from that in the case at bar.

It is hardly necessary to say that where incorporation has once taken place no act of forfeiture can be set up in a collateral action, until forfeiture has been judicially declared in an action brought for that purpose. See Angell & Ames on Corporations, Sec. 636, and cases cited. But the principle involved in those cases is essentially different from that in the case at bar.

In *Humphreys vs. Mooney,* 5 Colorado, 282, a creditor of an assumed corporation sought to hold a member as a partner. It was held that as his right of action was based upon an express contract with the assumed corporation he was

estopped to deny that it was in fact a corporation. The doctrine of that case is substantially that relied upon by the defendant. But it seems to us that it is not sustained by the weight of authority. The court cited in support of the decision, *Eaton vs. Aspinwall,* 19 N. Y. 121, and *Buffalo, etc., R. R. Co. vs. Cary,* 26 N. Y. 77, but neither of the cases, it appears to us, is in point.

There may, indeed, be certain irregularities, or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but insufficient to sustain a collateral action brought to enforce an individual liability of a member. But where the attempt at incorporation is under a general law, and there is a non-compliance with the law in a material respect, there is, we think, such want of incorporation that exemption from individual liability is not secured. In *Mokelumne Hill Mining Co. vs. Woodbury,* 14 Cal. 424, 73 Am. Dec. 658, the court said: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question."

*Hurt vs. Salisbury,* 55 Mo. 310, was an action brought upon a promissory note purporting to be executed by the directors of the North Missouri Central District Stock, Agricultural and Mechanical Association. The action was brought against the directors upon the ground that the association was not incorporated at the time the note was given, and that the directors were, therefore, individually liable. It appeared that the association at the time the note was given was fully incorporated in every respect except that it had failed to file its articles of incorporation with the secretary of state, as the statutes required. It was held that the directors were individually liable.

In *Bigelow vs. Gregory, et al.,* 73 Ill. 197, the defendants were held liable as partners for goods sold to an assumed corporation of which they were members. The defect in the

incorporation consisted in a failure to file the articles of incorporation with the clerk of the city where the corporation was to transact its business.

In that case the court said: "There is a manifest difference where a corporation is created by a special charter, and there have been acts of user, and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. And there would seem to be a distinction between a case where, in a suit between a corporation and a stockholder or other individuals, the plea of *nul tiel corporation* is set up to defeat a liability which he may have contracted with the other, and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former." This is a late decision, and seems to have been made with a full recognition of the authorities claimed to hold an adverse doctrine.

See also, *Abbott vs. Omaha Smelting Co.*, 4 Neb. 416, and *Harris vs. McGregor*, 29 Cal. 125.

In our opinion, the proprietors of the Lawrence Savings Bank failed to become incorporated, and there was nothing in what they did or claimed which can properly be held as sufficient to secure them exemption from individual liability.

The judgment, therefore, of the District Court must be *affirmed*.

NOTE: For other cases upon the question whether the members of a defectively organized corporation are liable as partners, see Mechem's Elem. of Partn., §§ 10-11.

## GUCKERT vs. HACKE, *et al.*

*Supreme Court of Pennsylvania, 1893.*

159 Pa. St. 303, 28 Atl. 249.

Appeal from Court of Common Pleas Allegheny Co., Porter, Judge.

At the trial before Porter, J., it appeared that plaintiff entered into a contract to make some alterations and repairs in a building occupied by the Hughes & Gawthrop Co., composed of Paul H. Hacke, C. C. Hughes, J. B. George and E. B. Gawthrop. In October, 1890, a certificate of incorporation in proper form was presented by The Hughes & Gawthrop Co., to the Governor asking for a charter. The certificate was approved and letters patent were duly issued. All the details of the act of April 29, 1874, P. L. 77, were complied with excepting only the recording of the certificate in the recorder's office of Allegheny county. The certificate was not recorded until June, 1891. In the meantime plaintiff without knowledge of these steps looking to incorporation made the contract with Gawthrop upon which he sued defendants as partners. The other facts sufficiently appear from the opinion.

From a judgment against defendant Gawthrop and in favor of the other defendants plaintiff appealed.

*Robb & Fitzsimmons,* for appellant.

*Robert S. Frazer,* for appellees.

STERRETT, C. J. It is essential to the creation of a corporation under an enabling statute that all material provisions should be substantially followed; and, exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint stock companies, it follows that those who transact business upon the strength of an organization which is materially defective are individually liable, as partners, to those with whom they have dealt. What provisions are material must be gathered from the relation of each to the purpose and scope of the act; and when,

therefore, successive steps are prescribed for the creation of corporations these must obviously be regarded as imperative. Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other mode of doing the act which they authorize; they must be strictly construed: Sutherland on Stat. Construction, Sec. 454. Hence it has been uniformly held that requirements in respect of filing charters are imperative: *Childs vs. Smith*, 55 Barb. 45; *Smith vs. Warden*, 86 Mo. 382; *Abbott vs. Smelting Co.*, 4 Neb. 416; Beach on Corporations, Sec. 162.

It is plain even from a cursory reading of the act of April 29, 1874, P. L. 77, that recording of the certificate "in the office for the recording of deeds, in and for the county where the chief operations are to be carried on," was intended to be made one of the conditions precedent to corporate existence. That was the last of successive steps required to be taken, and the right to begin the transaction of corporate business was made to depend upon the taking of that step. "From thenceforth," the act expressly declares, the subscribers and their associates and successors "shall be a corporation for the purposes and upon the terms named in the said charter." One of the purposes of the act being exemption from personal liability in the transaction of business, it is obviously material that the public should have notice, and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of incorporation, and consequently of exemption from liability.

It may be conceded that had plaintiff dealt with defendants as a corporation he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter: *Spahr vs. Bank*, 94 Pa. 429. But it is not pretended that he had any knowledge of the existence of the charter; and there was certainly nothing, either in the name under which they did business or in their conduct, which should have put him upon inquiry. In these circumstances he was amply justified in dealing with them as partners. It was through their default—not his—that they were so treated; and it would be manifest injustice that he should lose his admittedly honest claim.

In the absence of an express agreement the acceptance of a note from the defendants, as a corporation, after plaintiff had

performed his part of the contract, cannot operate by way of election or estoppel. The relation of the parties was fixed by their status when the original contract was made and cannot be changed by gratuitous inference. The members of the alleged corporation were the defendants, and were not injured by the acceptance of the note. The principle which treats the acceptance of a note as additional security to and not as satisfaction of a mechanic's lien (*Jones vs. Shawhan*, 4 W. & S. 257) is, with even more justice, applicable here.

It follows from what has been said that the instructions complained of are erroneous.

Judgment reversed and a *venire facias de novo* awarded.

NOTE.—See Mechem's Elements of Partn., §§ 10, 11.

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## OWENSBORO WAGON CO. vs. BLISS, *et al.*

*Supreme Court of Alabama, 1901.*

132 Ala. 253; 31 So. 81.

Appeal from circuit court, Lauderdale county; E. B. Almon, Judge.

Action by the Owensboro Wagon Company against R. L. Bliss and others. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

*John T. Ashcraft* and *Robt. E. Simpson*, for appellant.

*C. E. Jordan* and *Emmet O'Neal*, for appellees.

HARALSON, J. "A corporation *de facto* exists, when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law—when there is an organization with

color of law, and the exercise of corporate franchises." *Snider's Sons' Co. vs. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Central Agricultural & Mechanical Ass'n vs. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

"Corporations may exist either *de jure*, or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles as those of the former, so long as the State acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done, by a direct proceeding on the part of the State, from whom is derived the right to exist as a corporation, and whose authority is usurped." Id.; *Lehman, Durr & Co. vs. Warner*, 61 Ala. 455.

It is also well settled, as a corollary to the foregoing principles, that when one contracts with a corporation, which is in the exercise of corporate functions, but which is a *de facto* corporation merely, he will not, in a suit by the corporation on a contract made by him with it in its corporate name, be allowed to deny and disprove the rightfulness of its existence. 4 Am. & Eng. Enc. Law, 198; *Swartwout vs. Railroad Co.*, 24 Mich. 390. In the case last cited, COOLEY, J., declares, that "it is plainly a dictate, alike of justice and public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised." *Snider's Sons' Co. vs. Troy, supra; Cahall vs. Association*, 61 Ala. 232. In the Snider vs. Troy case, it was further held, that the same principle applied, whether in suits against stockholders to enforce unpaid subscriptions,—in which case the stockholder will not be allowed to dispute the due incorporation of the company,—or by a creditor of the corporation, who by denying the existence of the corporation, seeks to recover his debt against the stockholders, by suing them as partners. It is a correct and well settled principle, that "persons who have contracted with the corporation as such, and have acquired liens against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as partners." Snider's Sons' Co.'s Case, *supra;* Tayl. Corp. § 148. "A corporation *de facto* has an independent status, recognized

by the law, as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation." Adopting the language in *Fay vs. Noble*, 7 Cush. 188, this court said in Snider's Sons' Co.'s case, "Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows, as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them."

The facts in this case, without conflict, show that the defendants and a number of other persons, pursuing closely the provisions of the statute for the purpose (Code, p. 425, art. 11), associated themselves together for the purpose of incorporating the Farmers' Implement Company. They filed their declaration in the office of the probate judge of Lauderdale county, in accordance with the provisions of section 1252 of the Code. This declaration was indorsed: "Farmers' Implement Co. Declaration." "I hereby certify that the within conveyance, was filed in the office for record, on the 5th day of February, 1898, and duly recorded in Vol. —— of —— on page ——. ———, Judge of Probate." The word "conveyance," in this certificate, was a mere self-corrective clerical error, used for the word "declaration;" and the fact that the name of the judge of probate is not signed thereto, amounts to nothing. In the absence of statute prescribing what constitutes the filing of a paper, it is said to be filed whenever it is delivered to and is received by the proper officer. A bill in chancery, for instance, is to be considered as filed, when it is put in the custody and power of the court, by depositing it with the register, or with his assistant in his office, with the intention of filing it, although the fact and date of filing are not then indorsed on it. *Ex parte Stow*, 51 Ala. 69; *Truss vs. Harvey*, 120 Ala. 636, 24 South. 927; 8 Am. & Eng. Enc. Pl. & Prac. 928.

On the same day the declaration was filed, the judge of probate issued to two of the proposed incorporators, a commission to open books of subscription to the capital stock of the corporation, as per section 1253 of the Code. Afterwards, the commissioners, acting under this commission, opened books of subscription, and more than 50 per cent. of the capital stock was duly subscribed by parties deemed solvent, a list of whom was returned to the court, as a part of the report of the commissioners, and payments in money were made by each of the sub-

scribers of at least 20 per cent. of the stock subscribed by them, respectively. The subscribers met and organized the corporation by the election of a board of directors, a president, a secretary and general manager, and a treasurer, all of which was duly certified and returned in writing to the judge of probate, as provided by section 1255 of the Code. The only missing links for the perfection of a corporation *de jure* under the statute, as appears, were, that these papers, so returned and filed with the probate judge, were never recorded in his office, and no certificate of incorporation was issued by said judge, declaring said corporation fully organized, as provided by said section 1255 of the Code. It is too plain for controversy, that a corporation *de facto* was thus created, there being no allegation or evidence of fraud on the part of defendants and associates in the premises. The evidence shows, and the fact is undisputed, that under such incorporation, the company entered upon the transaction of business; that it was understood in the community to be a corporation, and, as such, it instituted and maintained suits in the justice's court of Florence. It was shown, that these defendants took no part in the management of the corporation; that they each paid in full, the stock subscribed by them, and never knew that a de jure corporation was not in fact organized, but supposed and believed it had been done. The defendant, Young, was president of the company, and testified that one J. M. Lassiter, the secretary and general manager, transacted all the business, and he, the witness, had nothing to do with its management, and never examined the books of the concern. The defendant, Bliss, testified to the same thing, as for himself. There was no evidence tending to show, that defendants had anything to do with contracting the account on which they are sued, or knew anything about it; nor that they ever consented to become partners in said corporation, or agreed to be anything more than stockholders therein, or ever held themselves out, or agreed that any one else should hold them out as partners therein, or were guilty of any fraud in the organization of said company. So far as the evidence shows or tends to show, their conduct was characterized by good faith towards their associates and the persons transacting business with the company.

The evidence of plaintiff tended to show that it had no actual notice of the incorporation of said company as a *de facto* or-

ganization, even. Its secretary and treasurer, W. A. Steele, testified by deposition, that no member of the Farmers' Implement Company, ever informed the plaintiff that said implement company was a corporation; that plaintiff never heard that it was such an organization, and that he thought that J. M. Lassiter, deceased, who was the secretary and managing agent of said implement company, informed the plaintiff by letter that defendants were members of a copartnership by that name, though he could not find or produce said letter. The evidence does not show, however,—even if that statement were taken as evidence of the fact, a question we need not decide,—that either of defendants ever authorized Lassiter to make such an admission as to them, or that they ever knew he made any such statement, without which, they were not bound by his declarations. The declarations of one partner, not made in the presence of his copartner, are never competent to prove the existence of the partnership between them. It is only when the partnership has been otherwise proved, that the declarations of one partner are evidence against the other, as to the conduct of the partnership business. The existence of a partnership can never be established by general reputation or on hearsay evidence. *Bank vs. Leland*, 122 Ala. 289, 25 South. 195.

In the absence of an agreement to become partners in the company, defendants cannot be held liable as such, unless they hold themselves out as partners. Holding one's self out, or permitting himself to be held out as a partner in a firm, will make him liable as such, to third persons who have been misled by, or who have acted upon such holding out; and in such case, the one so held out would be estopped as to them to deny that he was a partner. 17 Am. & Eng. Enc. Law, 879; George, Partn. p. 80; *Marble vs. Lypes*, 82 Ala. 322, 2 South. 701; *Fertilizer Co. vs. Reynolds*, 85 Ala. 19, 4 South. 639. As we have said, there is an entire absence of evidence tending to show that defendants ever knowingly or intentionally entered into a partnership relation with their associates, or ever held themselves out as copartners with them, or permitted any other person to do so.

The evidence shows, furthermore, beyond conflict, that at the time the plaintiff's contract with the Farmers' Implement Co. was entered into,—on the 2d July, 1898,—the papers above referred to for the incorporation of said company, were on file in

the office of the probate judge, having been filed therein, on the 5th of February, preceding, and remained there on file, until the 28th of October following, when the judge of probate allowed J. M. Lassiter to take them away,—for what purpose, is not shown. The judge took the receipt of Lassiter for the papers, which receipt the judge himself wrote or dictated, reciting what papers they were, and that they were "all the papers that were ever filed in the office of the said probate judge, of said corporation."

The plaintiff, at the time it contracted with said association, had thus, constructive notice of what was done towards the incorporation of the company, and that it had, at least, a *de facto* existence, which status was unaffected by the action of said Lassiter, in taking said papers from the probate office.

The fact that the Farmers' Implement Company had not, at the time it purchased the goods from plaintiff, paid the State and county license to do business, could not affect the status of the *de facto* corporation differently from what it would have affected a *de jure* corporation. The only possible effect such failure could have, would have been to render the company liable to the penalty prescribed by statute in such cases.

It is contended, again, that the failure to pay the fee prescribed by section 1287 of the Code, rendered the effort at incorporation abortive, and that the company, in consequence, did not have a *de facto* existence, even. In *Christian & Craft Grocery Co. vs. Fruitdale Lumber Co.*, 121 Ala. 340, 25 South. 566, we held, that if a commission is issued to a corporation organized under the statutes, the fact that the required fee was not paid, would not, of itself, prevent the corporation from having a *de facto* existence; but its contracts as stated, would be void. The statute under which that decision was made (Acts 1894–95, p. 1024), provided that all contracts by any corporation which had not first complied with the requirement for the payment of this fee, should be wholly void. That provision was not carried into the Code of 1896, but was omitted therefrom. Section 1287. Without reference to that fact, however, the failure to pay the fee, would not, as stated, of itself have prevented the formation of a *de facto* corporation. If they never intended, and did not agree to become partners, but desired in good faith to organize under the statute a corporation, which they failed to fully perfect, but did organize

one *de facto*, under color of law, which came into the exercise of corporate functions, the stockholders of such an organization, cannot be made liable as partners. Authorities *supra*.

Under the pleadings, and the legal evidence as developed on the trial, the court, in trying the case without a jury, very properly, as we think, found in favor of the defendants, and rendered judgment accordingly.

Affirmed.

NOTE.—See Mechem's Elements of Partn., §§ 10, 11.

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## STAVER & ABBOTT MANUF'G CO. vs. BLAKE *et al.*

*Supreme Court of Michigan, 1896.*

111 Mich. 282, 69 N. W. 508.

Error to circuit court, Kent county; William E. Grove, Judge.

Action by Staver & Abbott Manufacturing Company against Catherine A. Blake and others. From a judgment for defendants, plaintiff brings error. Affirmed.

*Wylie & Clapperton* (*Bundy & Travis*, of counsel, for appellant.

*Charles B. Blair* (*Fletcher & Wanty*, of counsel), for appellees.

GRANT, J. The defendants are the members and owners of the stock of the Grand Rapids Storage & Transfer Company, Limited, an association organized May 13, 1890, under chapter 79, How. Ann. St. The plaintiff is a manufacturing corporation of Chicago, Ill. It sues for merchandise alleged to have been sold and delivered to the defendants. The declaration is upon the common counts. The bill of particulars is for merchandise sold, for which notes were given, "executed by the name of Grand Rapids Storage & Transfer Company, Limited," dated January, May and July, 1895. No claim is made that these defendants made individual promises, upon the faith

of which these goods were sold and delivered, or that they had ever expressly formed a partnership, or that they had ever held themselves out to plaintiff as co-partners. The sole basis for the right of recovery against them is the failure of the original organizers to comply with the statute in organizing, and non-compliance with the statute in carrying on the business after it was organized. These defects are stated by the learned counsel to be as follows: (1) The articles did not state when and how $7,000 was to be paid. (2) They falsely stated that $13,000 in cash had been paid in, when, as a matter of fact, property instead of money had been paid in, without any schedule containing the names of the parties contributing, with a description and valuation of the property contributed. (3) No yearly or other meetings of the members of the association were held for five years. (4) No managers of the association were elected for upward of five years. (5) No subscription book was kept, as required by the statute. (6) The statute was not observed in the matter of contracting debts. (7) The statute was not observed in using the word "Limited" in connection with the associate name. The defendants contend (1) that the company was properly organized; (2) that the plaintiff was estopped to deny that the association was legally organized, and to assert partnership relations, because it dealt exclusively with the association, and not with its members as a partnership; (3) that partnership association limited are corporations; (4) that the expressed penalties imposed by the statute for its violation exclude all others; (5) that these defendants are subsequent stockholders, are innocent purchasers, and therefore not liable for irregularities in the organization of the association or its management.

1. The Original Organization. There is no evidence of any dishonesty or bad faith in the formation of this association. It was organized under the advice of eminent counsel, who drew the articles. On March 29, 1890, eight citizens of Grand Rapids signed an agreement to form an association to be known as the Grand Rapids Storage & Transfer Company, Limited. This agreement specified the amount each was to contribute. $12,800 were thus contributed, and, when the articles were formed, this was so stated therein. This money was invested in the purchase of property and the erection of a building for the business of the association. The capital stock was fixed at $20,000. $7,200 remained unpaid, and the articles did not specify when or how it should be paid. Technically, the

$12,800 of capital was not paid in cash at the time of the execution of the articles. It was, however, paid in shortly before, and for the purpose of, forming the association, and had been expended in the purchase of property for it, and to use in its business.

Subsequent Management. It is true that meetings were not held, and managers elected, and debts incurred, in strict compliance with the statute. The business was conducted in the name of the association, and without any fraudulent intent or acts.

2. The Provisions of the Law. This act was passed in 1877, and is entitled "An act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances." Section 1 declares that "the capital shall alone be liable for the debts of such association. * * * Contributions to the capital stock may be made in real or personal estate, at a valuation to be approved by all the members subscribing to the capital of such association." It also requires a schedule containing the names of such contributors, and the description and valuation of the property so contributed. Section 2 provides that the members shall not be liable on any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, otherwise than is provided by the act. This section further provides for proceedings in such cases, and makes the members liable for labor debts. It limits the liabilities of stockholders to the amount of their unpaid subscriptions, and requires a subscription list to be kept, which shall be open to inspection by creditors and members at all reasonable times. Section 6 prohibits division of profits to diminish or impair the capital of the association, and makes any one consenting to such a division liable to any persons interested or injured thereby, "to the amount of such diminution or impairment." Section 3 provides that "the omission of the word 'Limited' in the use of the name of the partnership association shall render each and every member of such partnership liable for any indebtedness, damage or liability arising therefrom."

3. Plaintiff's action is based upon contract, not upon tort. It insists that the letter of the law, in the formation and conduct of the partnership association limited, has not been complied with, and therefore the law makes the defendants either

partners or members of a joint-stock company at the common law, and therefore individually liable. None of these defendants was interested in this association at its organization. The husband of Mrs. Blake was one of the principal stockholders. She advanced to him the money which he originally paid in, and also the money with which he purchased, soon after the organization, most of the other stock. The stock was assigned to her as security. Subsequently, she discharged the liability of her husband, and took the stock, and now owns all but $200 worth, owned by the defendants Aldrich and Pantland. None of these was aware of any irregularity in the original organization or in its subsequent management. Plaintiff had for several years dealt with this association as such. Its correspondence was carried on with it. Its contracts were made with it. It had no belief that it was making any contract with these defendants, or that they were individually liable, for the correspondence and course of business refute any such conclusion. The very name of the association implied a warning to plaintiff that it was not dealing with the members or stockholders of this association in their individual capacity, but in their associate capacity, with their liability limited. It is presumed to know the law, and a reading of the statute would have shown it that the members of this association could only be held liable for the amount of stock subscribed. It therefore dealt with this association with full knowledge of the extent of the liability of its members. The liability fixed by statute is still open to it. If the managers or members of the association committed a fraud by which the plaintiff or any other creditor suffered damage, the law provides a remedy in tort, but not in contract. The law does not make contracts for parties. The law takes the contracts which have been made, and interprets them. The law does not permit A. to deal and make contracts with B. in one capacity, and then hold him liable in another. A partnership can only be held to exist *inter sese* when the parties have so agreed. When no such partnership in fact exists, but a party has held himself out as such to third persons, who have dealt with him upon the faith of that relation, the law estops him to assert the true relation in order to avoid liability. Under no other circumstances does the law hold one liable as a partner who is not in fact a partner. This court said, speaking through Justice Cooley, in *Beecher vs. Bush*, 45 Mich. 193, 7 N. W. 785; 40 Am. Rep. 465: "If parties in-

tended no partnership, the courts should give effect to their intent, unless somebody has been deceived by their acting, or assuming to act, as partners; and any such case must stand upon its peculiar facts, and upon special equities." See, also, *Webb vs. Johnson*, 95 Mich. 330, 54 N. W. 947. We cite no other authorities, as the rule is elementary.

These defendants have never agreed to be partners, and have never held themselves out to plaintiff or to the world as such. By the purchase of stock, they became members of a body, organized under a law, which made its capital and assets alone liable for its debts. This is the legal entity—and it is immaterial what name you give it—with which plaintiff dealt, made contracts, and to which it gave credit. The statute contains not a sentence from which any individual or partnership liability can be inferred. Upon what principle of common sense, justice, or equity can it now be held that plaintiff, having trusted this entity, can recover its entire debt from one with whom it never contracted, and who never promised to pay? It is unnecessary to determine wether these associations are corporations under our constitution, which provides that the term "corporations" shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." Article 15, § 11. It is the established rule that those dealing with corporations are estopped to deny the lawful existence thereof, and cannot, therefore, hold the stockholders individually liable, unless such liability is imposed by the statute. This rule is based upon two grounds: (1) That it is against public policy to permit the existence of these corporations to be attacked collaterally in suits between them and others. It is reserved for the State alone to question their legal existence through its law department. (2) Because parties have dealt with it as a corporation, and not upon the faith of the individual liability of its stockholders. We see no reason why the doctrine of estoppel should not be applied in the one case as well as in the other. There is no difference in principle between the two. Each is a legal entity, whose sole warrant for existence is found in, and whose powers and liabilities are fixed by, statute.

The doctrine of estoppel in this case need not, however, be based upon the determination of the question as to whether the Grand Rapids Storage & Transfer Company, Limited, was a corporation. If these defendants, in the absence of any statute,

had associated themselves together upon the same terms as those provided by this statute, had limited their liability in the same manner and for the same amount, had furnished plaintiff with a copy of that agreement, and it had sold them goods, the law would not permit it to recover against them, either as individuals or as partners. It had dealt with them and trusted them upon the strength of their limited liability. It had agreed to look to this alone, and the law will hold it to its undertaking. This rule is founded in good morals, as well as good law. The policy of the law for partnership associations limited is to relax the common-law rule, to permit parties to limit their liability, and exempt themselves from a liability which may be ruinous. Whether the policy is wise or unwise is a question for the legislature, and not for the courts.

The injustice in sustaining the plaintiff's contention is manifest. The law, as construed by counsel for plaintiff, says to A., who does not wish to actively engage in business, and be held responsible for its management: "You may invest $1,000 in the stock of one of these associations; and, although the law limits your liability to the amount of capital subscribed, still if there has been any defect, however innocently made, in the original articles of association, or in its subsequent management, you can be held liable for all the debts of the association." Such a rule is not founded in justice, common sense, sound logic, or good morals. Even in construing the statutes for the formation of limited partnership, no such harsh rule is always applied. *Buck vs. Alley*, 145 N. Y. 488, 496, 40 N. E. 236. The law of Michigan prohibited a corporation from doing any business before filing its articles of association. A corporation was formed under this law, but, before it had completed its organization by filing its articles, its prudential committee purchased goods. Suit was brought against this committee, who were directors, based upon the personal liability of the members. The court, in deciding the case, said: "It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the defendants individually. The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Utley vs. Donaldson*, 94 U. S. 29. * * * The corporation having assumed, by entering into the contract with the plaintiff, to have the requisite power, both parties are estopped to deny it." *Whit-*

*ney vs. Wyman*, 101 U. S. 392, 396. See, also, *American Mirror & Glass-Beveling Co. vs. Bulkley*, 107 Mich. 447, 65 N. W. 291.

We are aware that this decision is not in harmony with the decisions of the Supreme Court of Pennsylvania, but in so far as those decisions adopt the rigorous rule that the members of these associations are liable as partners because of some irregularity or defect in their organization or management, and thereby read into the statute a penalty which it does not impose, but which, by a fair construction of the statute, is excluded, we cannot follow them.

Other interesting and important questions are raised and ably discussed by counsel, but, inasmuch as the entire controversy is disposed of by the above opinion, we refrain from discussing them.

In one instance in dealing with the plaintiff, the manager of this association omitted the word "Limited." No testimony was introduced on the part of plaintiff to show that any "indebtedness, damage, or liability" arose to it in consequence of this single act, and therefore no right of action from this cause was shown to exist. The judgment is affirmed.

MONTGOMERY, J., did not sit. The other justices concurred.

NOTE.—See Mechem's Elem. of Partn. § 7.

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## CHILDERS, *et al.* vs. NEELY.

*Supreme Court of Appeals of West Virginia, 1899.*

47 W. Va. 70. 34 S. E. 828.

Appeal from circuit court, Tyler county; R. H. Freer, Judge.

Bill by J. M. Childers and another against S. H. Neely. Judgment for plaintiffs, and defendant appeals. Reversed.

*F. L. Blackmarr*, for appellant.

*Robert McEldowney* and *G. M. McCoy*, for appellees.

BRANNON, J. Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The

business was oil production. Neely admitted the joint enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution, if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed.

This case raises an interesting and important subject in this mining state; that is, whether, and when, joint tenants or tenants in common, jointly operating for oil, are partners, or merely co-owners. The bill asserts a partnership, while Neely denies it; asserting that it is a case, not of partnership, but co-ownership.

In two leases of town lots for oil and gas purposes, Childers owned a one-fourth interest; Raney, a three-eighths interest; Neely, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership,—in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product," instead of "profits," because there was no contract explicit on this point to distinguish product from profit. "Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners, without some special agreement which makes them so." T. Pars. Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar partnership, called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships.

What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: "When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership." Many authorities there cited thus define it. See the California case of *Skillman vs. Lachman*, 23 Cal. 198, 83 Am. Dec. 96,

and note discussing it fully; *Lamar's Ex'r vs. Hale*, 79 Va. 147. Mere co-working makes them partners, without special contract. Barring. & A. Mines & M. Courts of equity take jurisdiction of them as if general partnerships. 2. Colly. Partn. c. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but "where tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss." *Duryea vs. Burt*, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership.

Perhaps the case of *Bank vs. Osborne*, 159 Pa. St. 10, 28 Atl. 163, and other cases in that State cited in Bryan, Petroleum & Natural Gas, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That State does not recognize such a partnership. Justice Field said in *Kahn vs. Smelting Co.*, 102 U. S. 645, 26 L. Ed. 266; "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present."

One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, the *delectus personæ* (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this *delectus personæ* that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, one chosen member is gone, the union broken, because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In

the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences.

From the absence of this *delectus personæ* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. *Charles vs. Eshleman*, 5 Colo. 107; *Skillman vs. Lachman*, 83 Am. Dec. 96, and note; *McConnell vs. Denver*, 23 Cal. 198, 35 Cal. 365; *Jones vs. Clark*, 42 Cal. 180; *Manville vs. Parks*, 7 Colo. 128, 2 Pac. 212; *Congdon vs. Olds*, 18 Mont. 487, 46 Pac. 261; *Judge vs. Braswell*, 13 Bush, 67; *Waldron vs. Hughes*, 44 W. Va. 126, 29 S. E. 505. In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as *e. g.* a partnership to run a theatre or other single enterprise only. *Pease vs. Cole*, 53 Conn. 53, 22 Atl. 681; *Deardorf's Adm'r vs. Thacher*, 78 Mo. 128; Smith, Merc. Law, 82; T. Pars. Partn. § 85, 10 Heisk. (Tenn.) 629; *Pooley vs. Whitmore*, 27 Am. Rep. 733.

A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. Bates, Partn. § 329. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. *Dougherty vs. Creary*, 30 Cal. 290, 89 Am. Dec. 116.

These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts.

The remainder of the opinion is omitted.

NOTE.—See Mechem's Elem. of Partn. § 29.

# II.

## FOR WHAT PURPOSE ORGANIZED.

### CHESTER vs. DICKERSON.

*Commission of Appeals of New York, 1873.*

54 N. Y. 1, 13 Am. Rep. 550.

Action brought by Chester and others against Dickerson, Reed, Jones and Dewitt for damages arising from fraud and deceit in the sale of lands. It appeared that in November, 1864, defendants entered into written agreement whereby they agreed to purchase, lease and take refusals of lands on their joint account, and that they should sell, lease or work the lands thus taken. They further agreed that the expenses and losses, gains and profits, should be shared equally. There was evidence that this agreement had existed by parol from September, 1864. Lands were accordingly taken, and Reed entered into negotiations with plaintiffs, and represented the lands to be oil-producing, showing the indications of oil, which it appeared had been produced by petroleum poured on the lands by one Higgs, through the connivance of Jones. The plaintiffs purchased the lands on the faith of these representations and indications, and the purchase money was divided among the defendants. There was evidence that Reed participated in the fraud, but Dickerson was not implicated by the evidence. Dewitt died pending the action. Plaintiffs brought suit against defendants, on discovering the fraud. The court charged that the partnership could exist by parol, and that all of the defendants were liable for the fraud committed by either in and about the partnership. The plaintiffs obtained a verdict and judgment. The general term affirmed

the judgment, and defendants, Dickerson and Reed, appealed to this court.

*James Emott*, for appellants.

*A. Anthony*, for respondents.

EARL, C. It cannot be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. Story on Part., sec. 82, 83; Collyer on Part., sec. 3, 51, and note; *Dudley vs. Littlefield*, 21 Me. 418; *Sage vs. Sherman*, 2 N. Y. 417; *Mead vs. Shepard*, 54 Barb. 474; *Pendleton vs. Wambersie*, 4 Cranch, (U. S.) 73; *Thompson vs. Bowman*, 6 Wall (U. S.) 316; *Howie vs. Carr*, 1 Sumner (U. S. C. C.) 173.

Kent says: "A partnership is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and share the loss in certain proportions; and that it is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans or farmers, as well as between merchants and bankers," 3 Kent's Com. 24, 28; and why may it not exist between dealers and speculators in real estate?

But, as it is claimed that the partnership in this case existed by parol before the execution of the written agreement, dated November 28, 1864, it is necessary to inquire whether a partnership, in reference to lands, can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the one hand it is claimed that a parol agreement for such a partnership would be within the statute of frauds which provides that no estate or interest in lands shall be created, assigned or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same; and to this effect is the case of *Smith vs. Burnham*, 3 Sumner 435. On the other hand it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity

having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all of the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds; and to this effect are the following authorities: *Dale vs. Hamilton*, 5 Hare 369; *Essex vs. Essex*, 20 Beavan 449; *Bunnell vs. Taintor*, 4 Conn. 568. A full discussion of the question is found in *Dale vs. Hamilton*; and the reasoning and review of the cases there by Vice Chancellor Wigram are quite satisfactory. The general doctrine is there laid down that "a partnership agreement between A and B that they shall be jointly interested in a speculation for buying, improving for sale and selling lands may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A or B may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing." I am inclined to think this doctrine to be founded upon the best reason and the most authority. But whether it is or not, it is not very important to decide in this case. Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without a writing. If there was a parol agreement in this case before the written one, it was just like the one

embodied in the writing, to wit, a partnership to purchase, lease and take refusals of land and then sell, lease or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief.

We then come to the question whether there was sufficient proof of the existence of this partnership by parol before the 28th of November, 1864, and I cannot doubt that there was. Jones distinctly testified that the partnership between all the defendants did exist as early as September, and that it was afterwards put into writing. Neither Reed nor Dickerson, in their testimony, denied this, and neither of them claimed that they did not become partners until the writing was executed. There is abundant evidence that Reed was associated with Jones as early as the later part of September, or the fore part of October. It does not appear how or by what negotiation the members of the firm were brought together in partnership, and it does not appear through what agency Dickerson was induced to join with the others. As to him, all we have is the evidence of Jones, above referred to, and the writing, and the fact that he, subsequently, without objection, in the division of the money received from the plaintiffs, allowed his share of the sums paid for the services of Higgs, who was employed to pour oil upon the lands, from some time about the first of September. Hence we must take it as proved, in this case, that this partnership existed as early as September, 1864. But it is claimed, on the part of the appellants, that all the rules of commercial partnerships do not apply to partnerships in real estate. They apply to every other kind of partnership, and why not to this? This kind of partnership is formed like every other, for the mutual profit and advantage of the parties, and there is no reason why it should not be governed by the same rules.

In all partnerships one partner is the general agent of all the partners for the transaction of all the partnership business, and I can perceive no reason for not applying the same rule of agency to partnerships in real estate. In fact, all the powers, duties and rights which usually appertain to partner-

ships must appertain to partnerships in real estate, except as they are modified by the character of the property; and the only difference grows out of the rules of law in reference to the conveyance and transmission of real estate. One partner cannot convey the whole title to real estate unless the whole title is vested in him. *Van Brunt vs. Applegate*, 44 N. Y. 544. But he can enter into an executory contract to convey, which a court of equity will enforce. While a contract for the conveyance of land must be in writing, yet an agent to execute the contract may be appointed by parol. *Willard* on *Real Estate*, 376. And hence, when the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate. I find no authority holding that the rules of ordinary commercial partnerships do not apply to partnerships in real estate, except the case of *Pitts vs. Waugh*, 4 Mass. 424. It was there held that the law merchant respecting dormant partners did not extend to speculators in land. The learned judge writing the opinion did not cite any authority for the decision he made, and his reasons for the conclusions which he reached are not satisfactory.

Dormant partners are held liable for the debts and contracts of the firm, because they are, in fact, members of the firm, and share in its profits, and the law will not allow them secretly to share in the profits of the firm without taking their share of the risks and bearing their share of the losses, as to third persons. And there is precisely the same reasons for holding a dormant partner in a real estate partnership liable to all persons dealing with the firm. In *Patterson vs. Brewster*, 4 Edw. (N. Y.) Ch. 352, the vice chancellor expressed the opinion that the law merchant does not apply to partners in buying and selling land. This case and *Pitts vs. Waugh* are commented on by Judge Mitchell in *Benner vs. Harrison*, 19 Barb. 53, and are there shown not to be precise authority for the doctrines announced. It follows, therefore, that the court committed no error in holding that all the partners were liable for the frauds committed by either in the transaction and prosecution of the partnership enterprise, for it is well settled that the firm is bound for the fraud committed by one partner in the course of the transactions and business of the partnership, even when the other partners have not the slightest connection

with, or knowledge of, or participation in the fraud. Story on Part., sec. 108. Collyer on Part., sec. 445; *Griswold vs. Haven*, 25 N. Y. 595, 82 Am. Dec. 380.

[The remainder of the opinion is unimportant.]

Judgment affirmed.

NOTE: For other cases bearing upon partnerships organized for the purpose of dealing in land, see Mechem's Elem. of Partn., § 17 and notes.

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## WOODWORTH vs. BENNETT.

*Court of Appeals of New York, 1870.*

43 N. Y. 273, 3 Am. Rep. 706.

Appeal from a judgment of the supreme court affirming a judgment allowing a counter claim, in favor of the defendant Bennett and against the plaintiff Woodworth for $100. Opinion states the facts.

*G. F. Bicknell*, for appellant.

*Charles Mason*, for respondent.

CHURCH, C. J. The point in this case is, whether the court below erred in allowing to the defendant the sum of $100 as an offset. The facts are substantially as follows: The plaintiff, defendant, Stephens and Truesdell, made an agreement in the nature of a copartnership, to propose or bid for public work on the Seneca river improvement. The bid was to be put in in the name of the plaintiff alone, the defendant and Stephens to become sureties. Truesdell was at the time an engineer in the employ of the State on the canals. The bid was made in the name of the plaintiff, in accordance with the arrangement. Before the work was awarded, the said parties made an agreement with one Haroun, to withdraw their claim to the work, and sell their bid to him for $400 (he being a higher bidder for the same work), which was consummated, and he gave his note for the amount. It was then arranged that the note should be left with the plaintiff for collection, and that when collected each of said persons should be entitled

to $100. The plaintiff collected the note, paid to Stephens and Truesdell each $100, and promised to pay the defendant, and apply it on their deal, but never did. It is claimed that it cannot be allowed, on account of the illegality of the transaction out of which it arose. To enable the court to apply correct legal principles, it is necessary to analyze the transaction and ascertain its true nature and character.

The original arrangement for a joint interest or copartnership was illegal, and contrary to a positive statute in two respects. The law of 1854, chapter 329, in substance requires that every proposal for work shall contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named shall become interested in any contract that may be made, and engineers, and all other persons in the employ of the State on the canals, are also prohibited from becoming interested in any contract or job on the public works.

In the next place, the transaction with Haroun was contrary to public policy, and illegal. It is manifest that the object and purpose of the purchase of the bid was to have it withdrawn so as to enable Haroun to take the contract upon a higher bid. This was directly against the interests of the State, and tended to destroy that honest competition which public bidding is designed to secure; and when, as in this case, it was done partly for the benefit of an officer of the State, whose duty it was to protect its interests, it was not only contrary to public policy, but was grossly corrupt.

The supreme court placed its decision in favor of the defendant, upon the ground that as between these parties, the illegal contract had been fully executed when Haroun paid the money, and that the plaintiff then became a mere depositary, and held the money for the use of the other parties.

It is undoubtedly true that, if the contract or obligation does not depend upon nor require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. It has been laid down as a test, that whether a demand connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires any aid from the illegal transaction to establish the case: *Chitty* on *Con.* 657. So it has been settled that where a party pays money to a third person for the use of another, which, on account of

the illegality of the transaction, he was not obliged to pay, such third person cannot interpose the defense of illegality [to an action for the money brought by the person for whose use it was so paid]. *Tenant vs. Elliott*, 1 Bos. & Pull. 3; *Merritt vs. Millard*, 4 Keyes, (N. Y.) 208. This principle is based upon the undoubted right of a person to waive the illegality, and pay the money; and that when once paid, either to the other party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive.

If the only illegal transaction was the contract with Haroun for the sale of the bid, these principles might be applicable, and would probably constitute a good answer to the objection to this counter claim. The payment of the money by Haroun completed that contract, and nothing remained unexecuted. But here the original partnership was illegal; not because of its purposes and objects, but its composition was prohibited by law. If a lawful firm should receive funds from an illegal traffic or business, it may be that the illegality would be regarded at an end, and a division of the money enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried: *Brooks vs. Martin*, 2 Wall. (U. S.) 70.

In such a case the obligation to divide would not arise out of the illegal purposes of the firm, nor would the division carry out any of those purposes, but the obligation would arise out of the contract of partnership itself. Here this contract was illegal. The object of the statute was to enable the State officers to know with whom they contracted, and also to see that the statute, prohibiting engineers and other canal officers from becoming interested, was not violated, and to prevent all secret combinations in relation to obtaining work.

The money obtained by this bid belongs to the firm; and the plaintiff could have been compelled to divide, if the firm had been lawful, by force of the contract organizing it. In this case he also agreed to pay the money, and defendant asks the court to compel him to perform this obligation. The answer to it is obvious. There is no obligation, because it was incurred contrary to law. It rests upon the contract of partnership, and that is void for illegality.

In law there was no partnership, and none of the parties obtained any rights under the contract creating it: *Armstrong vs. Lewis*, 3 Mylne & Keene 45.

The sentiment of "honor among thieves" cannot be enforced in courts of justice. Suppose the engineer had sued for his share after an express promise, would any court have tolerated his claim for a moment in the face of a statute prohibiting him from being interested? If not, in what respect does the defendant occupy any better position? The first step in his case is to prove that he was a secret partner and entitled to a share of this money. The law prohibits secret partners, and he is, therefore, not a partner.

The express promise does not aid the defendant, because the promise was only to carry out the unexecuted provision of the contract of partnership to divide the money. The two cases cited by the counsel for the defendant, if they are to be regarded as good law, are distinguishable from this. In the case of *Faikney vs. Renous*, 4 Burr. 2069, one of two partners had paid £3,000 to settle differences in illegal stock-jobbing operations, and the defendant executed his bond to secure the share of the other partner. The court overruled the defense recognizing the exploded distinction between acts *malum prohibitum* and *malum in se*, and held that as between those parties the bond was to secure the plaintiff for money paid, and the purposes of the payment would not be inquired into. A similar decision was made upon the authority of this case in *Petrie vs. Hannay*, 3 Term Report 418, Lord KENYON dissenting. The distinction between the above cases and this is in the circumstance that there the illegal transactions had been closed up and settled, and the obligations sought to be enforced were for the money advanced for that purpose. Here it is sought to consummate the illegal contract by a new agreement that it shall be performed. No case has gone this length, and the two cases above cited have been very much shaken by subsequent decisions, and are, to say the least, questionable authority, especially the latter: *Aubert vs. Maze*, 2 Bos. & Pul. 370; *Mitchell vs. Cockburne*, 2 H. Blackstone 380; *Ex parte* Daniels, 14 Ves. 190; *Lowry vs. Bourdieu*, 2 Douglas 467; *Brown vs. Turner*, 7 Term Rep. 630; *Belding vs. Pitkin*, 2 Caines (N. Y.) 147, note *a*.

The general rule on this subject is laid down in this court,

in *Gray vs. Hook*, 4 N. Y. 499, by MULLETT, J., as follows: "The distinction between a void and a valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of considerations may be sustained."

It is sometimes difficult to apply general rules to particular cases, but this case comes clearly within the first class mentioned in the above rule. It is not from any regard to the rights of the party setting up this defense that courts refuse to enforce illegal contracts, but it is for the protection of the public. The plaintiff in this case is entitled to no sympathy or favorable consideration. He must have made an affidavit that no other person was interested with him in the proposal, and when he received this money, as between him and the defendant, the latter was entitled to it; and while we have no disposition to justify his conduct, his position enables him to secure the advantage of a decision which we are compelled to make in obedience to a principle of public policy which is indispensable for the protection of the community against the corrupting influences of illegal transactions.

The observation of Lord MANSFIELD in *Holman vs. Johnson*, 1 Cowper 343, is applicable here. He said: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant (in this case the plaintiff). It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say."

Judgment must be reversed and a new trial ordered, costs to abide the event.

All the judges concurring.

Judgment reversed and a new trial ordered.

NOTE: See following case.

## CRAFT vs. McCONOUGHY.

*Supreme Court of Illinois, 1875.*

79 Illinois, 348, 22 Am. Rep. 171.

Bill in equity by McConoughy against Craft and others for an account and distribution of the profits of an alleged partnership existing under the contract referred to in the opinion. The defense was that the contract was void as in restraint of trade and opposed to public policy. Decree below for complainant and defendants appeal.

*M. D. Hathaway, Wm. Barge* and *S. Dixon*, for defendants.

*Jas. K. Edsall*, for complainant.

CRAIG, J. (After stating the facts.) Two questions arise upon the record: First, whether the contract set out in the bill is void. Second, if illegal and void, will a court of equity, after it has been executed, require one of the parties to account to another for a portion of the gains arising under the contract?

Prior to and up to the time of the execution of the agreement set out in the bill, the four parties were engaged in the grain business in the town of Rochelle, each one on his own account, and in competition with each other, but, after the agreement was executed, all competition ceased. All the warehouses in the city, and every lot suitable to erect a warehouse upon, were controlled by the combination. Some were purchased and others were leased, so that the combinations formed effectually excluded all opposition in the purchase, sale, storage and shipment of grain in that market.

Secret meetings were held in the night time by the parties to the contract, at which the price to be paid for grain was agreed upon, rates for storage and shipment fixed, in order that the public should be kept in ignorance of the plans and operations of this illegal combination.

To the public the four houses were held out as competing firms for business. Secretly they had conspired together, and were working in a common cause, in the sole interest of each other.

The language used in the contract itself leaves no room for doubt as to the purpose for which the agreement was entered into, as a few extracts will show: "Each separate firm shall conduct their own business as heretofore, as though there was no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own fund to do business with." * * * "Prices and grades to be fixed from time to time as convenient, and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel monthly." * * * "No grain to be shipped by any party at less rates than two cents per bushel."

While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country.

That the effect of this contract was to restrain the trade and commerce of the country is a proposition that can not be successfully denied.

We understand it to be a well settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restraint reasonable.

This subject was ably discussed in the leading case of *Mitchel vs. Reynolds*, 1 P. Williams 181; see, also, 1 Smith's Lead. cases, 172, and notes, and the rule of law established, which has been followed and adhered to in numerous cases since.

In reference to the point, what might be regarded a reasonable restriction, numerous cases might be cited, but what was said in *Horner vs. Graves*, 7 Bing. 743, 20 Eng. Com. L. 330, will illustrate the principle. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is

such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either: It can only be oppressive, and if oppressive, it is, in the eye of the law unreasonable. Whatever is injurious to the interest of the public is void, on the ground of public policy."

If, therefore, the restraint imposed by the contract in question was but partial, as insisted upon by the complainant, as it was unreasonable, oppressive and injurious to the public, it cannot be sanctioned in a court of equity.

While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection. *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Penn. St. 173, 8 Am. Rep. 159.

It is, however, insisted that, even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account.

The rule is, however, well settled in this State, that a court of equity will not lend its aid in the division of the profits of an illegal transaction between associates. *Neustadt vs. Hall*, 58 Ill. 172; *Skeels vs. Phillips*, 54 Ill. 309; *Jerome vs. Bigelow*, 66 Ill. 452.

The complainant and the defendants were equally involved in the unlawful combination. A court of equity will assist neither.

The decree will be reversed and the cause remanded.

Decree reversed.

NOTE: For other cases upon the effect of illegality in the purpose, see Mechem's Elem. of Partn., §§ 18, 20.

# III.

## WHO MAY BE PARTNERS.

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### ADAMS vs. BEALL.

*Supreme Court of Maryland, 1887.*

67 Md. 58, 1 Am. St. Rep. 379, 8 Atl. Rep. 664.

Appeal from the Baltimore city court.

*Albert Ritchie*, for appellant.
*William Colton*, for appellee.

ROBINSON, J. The appellee, while a minor, paid to the appellant $2,900, as a consideration for being admitted as a partner in the appellant's business. The partnership continued for more than a year, and, finding it unprofitable, the appellee, without formally dissolving the partnership, withdrew from the business. The question in the case is whether the appellee is entitled to recover of the appellant the money thus paid. His right to disaffirm the partnership contract, and to avoid all liabilities under it, including the partnership debts, is not denied. Being an infant when the contract was made, this is a privilege to which for his protection he is entitled. But when he seeks to recover money paid for a consideration which he has enjoyed or has had the benefit of, this presents quite another question. The $2,900 was paid to the appellant in consideration of being admitted as a partner in his business. He was admitted as a partner, and continued to be a member of the firm for at least a year. The business was not, it is true, a successful one, but this, in the absence of fraudulent representations on the part of the appellant, cannot affect the question. We are dealing with a contract between an infant and

adult, executed on both sides, and upon the faith of which money was paid by the infant for a consideration which he has enjoyed. The privilege of infancy, says Lord MANSFIELD in *Zouch vs. Parsons*, 3 Burrows 1804, was intended as a shield or protection to the infant, and not to be used as the instrument of fraud and injustice to others; and to hold that an infant has the right, not only to withdraw from a partnership at his own pleasure, and to subject the adult partner to the payment of all the partnership debts, but has the right also to recover money paid by him as a consideration for being admitted into the partnership, would be, it seems to us, to extend the privilege beyond any just principles upon which it is founded.

So long ago as *Brawner vs. Franklin*, 4 Gill (Md.), 463, it was held that, where an infant advances money upon a contract, he cannot disaffirm the contract and recover the money advanced, if he has enjoyed the consideration for which the money was paid. *Holmes vs. Blogg*, 8 Taunt. 508, is to the same effect. There the infant paid a sum of money as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant dissolved the partnership, and brought an action to recover back the money he had paid the lessor for his lease. GIBBS, C. J., said: "He may, it is true, avoid the lease; he may escape the burden of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it. The law does not enable him to do that."

It is a mistake to suppose that the principle on which this case was decided was either overruled, or even questioned, in *Corpe vs. Overton*, 10 Bing. 252. In the latter case, the plaintiff, while an infant, signed an agreement to enter into partnership with the defendant, and to pay him £1,000 for a share in the business; and to execute, on the first day of January, a partnership deed, with the usual covenants. He also paid £100 as a deposit for the fulfillment of his part of the contract. The plaintiff afterwards disaffirmed the partnership contract, and never did in fact become a partner. The suit was brought to recover of the defendant the £100 paid by the infant as a deposit. TINDAL, C. J., said: The case was distinguishable

from *Holmes vs. Blogg*. In that case the plaintiff and partner occupied the premises from March till June, and the money was paid for something available, that is, for three months enjoyment of the premises. "In the present case, the plaintiff has paid to Overton £100, for which he has not received the slightest consideration. The money was paid either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. Now, the partnership was not to be entered into till January, 1833, and in the meanwhile the infant has derived no advantage whatever from the contract." BOSANQUET, J.: "We are far from impeaching *Holmes vs. Blogg*, as applicable to the facts of that case. * * * Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. * * * The £100 paid here was in the nature of a deposit. Money paid on a deposit may generally be recovered back where the contract goes off, and here the contract was defeated before the infant derived any benefit from it." ALDERSON and GASELEE, JJ., were of the same opinion. The plaintiff was allowed to recover the deposit money paid by him, while an infant, because the partnership contract was disaffirmed by Corpe before the time agreed upon for it to begin. As it was said by ALDERSON, J., "Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made." The distinction between *Holmes vs. Blogg*, and *Corpe vs. Overton* is this: In the former the plaintiff was not allowed to recover the money paid by him while an infant, because it was paid on a consideration which he had in part enjoyed, while in the latter the plaintiff was allowed to recover as upon an entire failure of consideration.

Passing, then, from these cases, we come to *Ex parte Taylor*, 8 De Gex, M. & G. 254, which is a case directly in point. There an infant paid a premium on entering into a partnership, and, before he came of age, disaffirmed the contract, and, upon the bankruptcy of the firm, attempted to prove for the premium thus paid. Lord Justice KNIGHT BRUCE said: "In my opinion, a case of fraud has not been established. That being so, the matter remains one of a contract fairly made, or as fairly made as a contract with an infant could be made, a contract upon which the infant acted during his minority, and which during

his minority has been in part performed on each side. In such a state of things, I conceive that, if the bankrupts had continued solvent, and an action had been brought against them by the minor, either before or after majority, for the purpose of recovering the money in question, there must have been either a nonsuit or a verdict against him." Lord Justice TURNER said: "It is clear, an infant cannot be absolutely bound by a contract entered into during his minority. He must have the right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question, whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but, if he does pay for it during his minority, he cannot on attaining his majority recover the money back."

We have quoted at length from the preceding cases, because the question at issue is an important one, and comes before us for the first time for decision. And while fully recognizing the privilege which the law accords to minors in regard to contracts made during their minority, yet, in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remains a partner for a given time, he ought not to be allowed to recover back the money thus paid unless he was induced to enter into the partnership by the fraudulent representations of the appellant. Whether an infant can avoid a contract and sue thereon during his minority, or must wait until he arrives at age, is a question about which the decisions are conflicting. To hold that he cannot disaffirm a voidable contract until he attains his majority would in many cases work the greatest injustice to an infant. And where the contract is of a personal nature, or relating to personal property, we see no good reason why such a contract may not be avoided, either before or after his majority. *Stafford vs. Roof*, 9 Cow. 626; *Shipman vs. Horton*, 17 Conn. 481; *Willis vs. Twambly*, 13 Mass. 204.

The court having erred in granting the plaintiff's first and second prayers, the judgment must be reversed. Judgment reversed, and new trial awarded.

NOTE: For other cases respecting the rights and liabilities of infant partners, see Mechem's Elem. of Partn., § 23 and notes.

# BUSH vs. LINTHICUM.

*Court of Appeals of Maryland, 1882.*

59 Md. 344.

Appeal from the circuit court for Anne Arundel County, in Equity.

The following facts appear from the opinion delivered in the Circuit Court:

Complainant Linthicum and defendant Weir entered into a written agreement of partnership which specified no time for the continuance of the partnership.

After the business had been conducted some time Linthicum filed this bill against Weir making numerous charges and praying for dissolution, for a receiver and for an injunction. The court appointed a receiver and granted the injunction. The defendant filed his answer admitting the partnership, denying the charges, and moved to dissolve the injunction and for a revocation of the order appointing a receiver. An order was granted to take testimony to be used upon the hearing of the motion to dissolve and for the revocation of the appointment of a receiver.

The court continuing, says:

"Afterwards on the 22nd of May, and before any testimony was taken under this order, the defendant, by next friend, and by way of rejoinder to the complainant's replication, interposed the plea of infancy, alleging that he was born on the 3rd of July, 1862, and charging that the complainant is not therefore entitled to maintain this suit against him. To this the complainant, on the 7th of June, entered a motion of *ne recipiatur*, upon the grounds:

"1st. That the defendant having filed his answer to the bill, and not having alleged his minority in that answer, it is now too late to avail himself of such plea in rejoinder to the complainant's replication.

"2d. Because, admitting that the defendant was not twenty-one years of age when he entered into the partnership, and has

not yet attained that age, still these facts will not, under the pleadings in this case, prevent the court from granting the complainant relief.

"3d. Because the defendant held himself out to the complainant and to the world as of the age of twenty-one years when the copartnership was formed, and the complainant believed that he was of full age, and that the complainant having been imposed upon by the fraud and deceit of the defendant, he will not now be allowed to take advantage of his own wrongful acts, and the Court should not therefore sustain his defense of infancy.

"The case has been argued upon a general demurrer by the defendant to this motion, and on the part of the defendant it is strenuously insisted that this plea of infancy is a flat and absolute bar to all the relief asked by the complainant in his bill, and that the same must be dismissed with costs, and the proceedings ended.

"To this proposition thus broadly stated and insisted upon, I cannot yield assent. I concede that the law casts its protection and guardianship around infants, as to all their contracts, except those for necessaries, and that it is not competent for the Court in this case to pass any decree which will impose any personal liability upon the infant defendant for the debts of this firm, or enforce upon him any of the terms or conditions of this partnership contract, or even compel him to pay any of the costs of these proceedings. So far I agree that his infancy protects him, but I am clearly of opinion that it is perfectly competent for the Court to decree a dissolution of the partnership, and to wind up its affairs through the medium of a receiver—that is, to collect the debts due to the firm, sell its assets, and apply the same to the payment of its debts. In doing this, no wrong is done to the infant, no executory contract is enforced against him, and he is thereby merely restrained from using his infancy as a means of doing injustice to, or perhaps perpetrating a fraud upon, his copartner. If the Court has not the power to grant relief to this extent, then the adult will, in every case, be placed at the mercy of the infant partner. All the books upon partnership lay down the proposition that an infant may become a partner with an adult. It is a contract not absolutely void, but

one which the infant may stand to or repudiate, at his election. While he remains a partner he has the rights and powers of a partner. He has equal right, with his copartner, to the possession of the assets of the firm, to collect the debts due it, and he has also the power to contract debts in the name of the firm, which though he may himself subsequently repudiate, and get rid of personal responsibility therefor, are still binding upon his copartner. Take then the case of an adult who has unfortunately entered into a partnership with an infant, who misrepresented himself at the time to be of full age. After a short time both become dissatisfied, mutual confidence is destroyed, and each becomes odious to the other. The infant then knowing the security from responsibility which his infancy affords him, and at the same time availing himself of his powers as a partner, and seeking to defraud and injure his copartner, proceeds to get possession of the partnership assets to sell them, and to put the proceeds in his pocket, and goes on contracting debts which he knows he is not responsible for, but which he also knows will work the absolute bankruptcy of his copartner. Is it possible that a court of equity has no power, at the instance of the adult partner, to lay its hands upon such a concern, stay the consummation of his ruin, and release the tie which binds him to the body of such a death? In my opinion there is no such lack of remedial power in courts of equity, and infancy cannot be availed of as a bar to such relief. If authority be needed in support of this position, it seems to me that it is abundantly sustained by the decision of the Chancellor in the case of *Kitchen v. Lee*, 11 Paige 107."

In accordance with, and accompanying the foregoing opinion, the Court passed the following order:

It is, thereupon, this 10th day of June, 1882, adjudged and ordered, that the plea of infancy filed in this case by the defendant, on the 22d day of May last, be, and the same is hereby overruled and rejected in so far as it is sought to be used as a bar to so much of the relief prayed by the bill as asks for a dissolution of the partnership, the granting of the injunction prayed for, and the appointment of a receiver to take charge of and wind up the affairs of the firm by collecting the debts due to it, by taking possession of and selling its assets, and by

applying the same to the payment of its debts; and it is further adjudged, that the order of the 9th of May last, granting the injunction and appointing the receiver, be and the same is hereby continued, until the further order of this Court.

From the above order the present appeal was taken.

The cause was argued before Alvey, Yellott, Stone, Robinson, Irving and Ritchie, JJ.

*Frank H. Stockett, Jr.*, and *Frank H. Stockett*, for the appellant.

*John Ireland* and *James Revell*, for the appellee.

IRVING, J., delivered the opinion of the court.

The appellee (Linthicum) having filed a bill for the dissolution of the partnership between himself and one Richard H. Weir, the case proceeded to answer and replication; and then an order to take testimony upon the motion to dissolve the injunction, and discharge the receiver, who had been appointed at the granting of the injunction. At this stage of the case, the defendant, who had answered under oath, and appeared by a solicitor, interposed, through the appellant (Bush), his next friend, a plea of infancy, and prayed that the bill might be dismissed. Upon this plea being filed, a motion of *ne recipiatur* was made and filed by the complainant, to which the appellant demurred; and the demurrer having been overruled, appeal was taken. The sole question therefore is, was the Court right in overruling the demurrer and rejecting the plea of infancy, to the extent expressed in the order of the tenth of June, 1882, appealed from?

The facts of the case are so fully set out in the opinion of the Circuit Court, which we adopt, that it is useless to re-state them. The reasoning of the Court, in support of the order passed, is so cogent that we can add nothing to its force, and shall rest our affirmance mainly upon the ground taken in that opinion. By the demurrer to the motion and reasons assigned, the defendant admitted the facts stated in the third reason, that the complainant had no knowledge of the defendant's minority, and had been deceived by his representations that he was

of full age. Had the complainant discovered that the defendant had so deceived him, before filing his bill, he could and would have made that allegation as an additional ground for the court's interference, and it would have justified the relief prayed for. The fact that he did not, upon the interposition of the plea, ask leave to amend that he might so charge, cannot operate to his prejudice. Where an injunction has been granted and a motion to dissolve has been made, it is not usual to ask for, or for the court to grant, leave to amend; and the reasons are so obvious we need not give them. The plea interposed new matter, infancy, by way of defense, but the plea does not aver that the complainant had knowledge of it, and entered into the partnership notwithstanding complainant's motion sets up the want of knowledge and the defendant's deception as reasons against receiving the plea; and the demurrer, as we have already said, concedes the facts so set up. Upon the demurrer the matter was considered, as if the complainant instead of filing his motion that the plea be not received, had replied alleging the facts stated in the third reason assigned for the motion, and the defendant had then demurred. Whether complainant had knowledge of defendant's infancy and was deceived about it, is not an open question, as the demurrer admits the facts charged. It would be strange indeed, if a court of equity could regard infancy pleaded under such circumstances as good ground for abating the suit, when the same facts, if alleged in the bill, would have given claim to relief. The inconsistency is so apparent that we cannot doubt the correctness of the court's ruling that the plea was not a bar to the whole proceeding.

The court was right also in refusing to make the defendant personally answerable even for costs, for although he may be a partner he cannot be held for contracts of the firm individually unless he affirms, or does that which amounts to affirmance after reaching majority. In *Dunton vs. Brown*, 31 Mich. 182, it was decided that an infant who had made a partnership could not disaffirm it until he arrived at age, and could not by next friend, a guardian, recover back what had been put into the concern. The same doctrine was again affirmed by Judge Cooley in *Armitage vs. Widoe*, 36 Mich. 130. Having formed this partnership, he cannot so far repudiate it during minority

as to escape such consequences of partnership as do not involve personal liability for claims against the firm, or costs incident to the legal settlement of its affairs. Such partnership must be dissolvable as any other; and the partnership assets must be assignable to partnership creditors. What his rights may be, as against his adult co-partners, when he reaches majority, we do not decide.

Approving the court's order it will be affirmed, and the cause remanded.

Order affirmed, and cause remanded.

NOTE.—See Mechem's Elements of Partn., § 28.

## ARTMAN vs. FERGUSON.

*Supreme Court of Michigan, 1888.*

78 Mich. 146, 18 Am. St. Rep. 572, 40 N. W. Rep. 907, 2 L. R. A. 243.

This action is brought in the circuit court for the county of Jackson, on the common counts in *assumpsit*, to recover for goods sold and delivered to the defendants, doing business at Jackson as Peter Ferguson & Co. The defendants are husband and wife, and the plaintiff sought to show that, after their marriage, they formed a copartnership, and carried on the retail carpet business in the city of Jackson under the firm name of Peter Ferguson & Co., and that during such time the goods involved in this suit were sold to them; that Margaret W. Ferguson was, at the time of the formation of such copartnership, possessed of property in her own right, of the value of $20,000, and furnished the entire capital for the business, and provided a place to carry on such business; that Peter Ferguson had no means, and was to and did manage the business; that the copartnership continued until after the last item of goods mentioned in the bill of particulars was sold. This evidence was objected to by defendants' counsel, on the ground that it was not competent for husband and wife to enter into a copartnership with each other. The circuit court sustained the objection, and directed a verdict for defendants. Plaintiffs bring the case to this court by writ of error.

*Thomas A. Wilson*, for appellants.

*Richard Price* and *Austin Blair*, for appellees.

LONG, J. The only question arising is whether the husband and wife can enter into a contract of partnership between themselves, and thus render themselves jointly liable for the contracts of the firm thus established. At the common law married women were incapable of forming a partnership, since they were disabled, generally, to contract or to engage in trade; and the husband and wife were wholly incapicitated to contract with each other. Whatever rights or powers the husband and wife have to contract with each other, or that the wife may have to enter into a copartnership to carry on trade or business, must

be conferred by our constitution and statutes. There was never any impediment to the acquisition of property through purchase by a married woman. The difficulty was that at the common law the ownership passed immediately to the husband by virtue of the marriage relation. Our statute has not removed all the common-law disabilities of married women. It has not conferred upon her the power of a *feme sole*, except in certain directions. It has only provided that her real and personal estate acquired before marriage, and all property, real and personal, to which she may afterwards become entitled in any manner, shall be and remain her estate, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, and bequeathed by her as if she were unmarried; and she may sue and be sued in relation to her sole property as if she were unmarried. How. St. §§ 6295-6297. In all other respects she is a *feme covert*, and subject to all the restraints and disabilities consequent upon that relation.

A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. That a married woman may, when she has separate estate, be a copartner with a person other than her husband, is held in many states under the married woman's statutes. But where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law provides that she cannot enter a firm. It has been held by a great preponderance of authorities, even under the broadest statutes, that a married woman has no capacity to contract a partnership with her husband, or, in other words, to become a member of a firm in which her husband is a partner, even in those states in which she may embark in another partnership; and though she holds herself out as such partner, and her means give credit to the firm, she is held not liable for the debts, as she cannot, by acts or declarations, remove her own disabilities. *Lord vs. Parker*, 3 Allen, 127; *Bowker vs. Bradford*, 140 Mass. 521, 5 N. E. Rep. 480; *Haas vs. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Payne vs. Thompson*, 44 Ohio St. 192; *Kaufman vs. Schoeffel*, 37 Hun 140; *Cox vs. Miller*, 54 Tex. 16; *Mayer vs. Soyster*, 30 Md. 402.

In this State a married woman was subject to the com-

mon-law disabilities of coverture until the passage of the married woman's act of 1855. How. St. §§ 6295-6299. This act does not touch a wife's interests in her husband's property, and these remain under the restrictions of the common law, unless they are removed by some other statute. The wife's common-law disabilities are only partially removed by the act, and one who relies on a wife's contract must show the facts in order that they may appear whether she had capacity to make it. *Edwards vs McEnhill*, 51 Mich. 161, 16 N. W. Rep. 322. Under our statutes a wife has no power to contract except in regard to her separate property. The constitution and statutes are clear against her right to make a mere personal obligation unconnected with property, and not charging it, so that she cannot become personally bound jointly with her husband, nor as a surety, by mere personal promise. *De Vries vs. Conklin*, 22 Mich. 255; *West vs. Largaway*, 28 Mich. 464; *Emery vs. Lord*, 26 Mich. 431. In *Jenne vs. Marble*, 37 Mich. 319, Mr. Justice CAMPBELL, speaking with reference to a lease, said: "The language of the statute is no broader than the equitable rules concerning separate property laid down in the same words in most of the old decisions. * * * The disabilities of testimony are entirely inconsistent with the idea that husband and wife may deal with each other as third persons can. This is impossible, if they cannot testify concerning these contracts; and when the law recognizes, as it always has done, the peculiar power of substantial coercion possessed by husbands over wives, it would not be proper to infer any legal intent to remove protection against such influence from any vague provisions which no one supposes were ever actually designed to reach such a result, and which can only be made to do it by an extended construction. Any one can readily see the mischiefs of allowing persons thus related to put themselves habitually in business antagonism, and legislation which can be construed as permitting it is so radically opposed to the system which is found embodied in our statutes generally that it should be plain enough to admit of no other meaning."

It is the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control, and if she might enter into a business part-

nership with her husband it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women. This doctrine was laid down in *Bassett vs. Shepardson*, 52 Mich. 3, 17 N. W. Rep. 217, and we see no reason for departing from it. The important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property and a joint power of disposal and a mutual liability for the contracts and obligations of each other. The judgment of the court below must be affirmed, with costs.

The other justices concurred.

NOTE: For other cases to same effect, see Mechem's Elem. of Partn., § 25. Compare also with following case.

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## SUAU vs. CAFFE.

*Court of Appeals of New York, 1890.*

122 N. Y. 308, 25 N. E. Rep. 488, 9 L. R. A. 598.

On the 29th of January, 1881, the defendants, George and Adele Marie Caffe, then and now husband and wife, executed, and, on June 1, 1881, recorded in the office of the clerk of the city and county of New York a certificate by which they assumed to form a limited partnership pursuant to the Revised Statutes, for the purpose of importing and dealing in foreign goods, at the city of New York, under the firm name of George Caffe, which was to continue from February 1, 1881, to February 1, 1886. The husband was the general and the wife the special partner, she contributing $25,000. Thereafter, they carried on a business of the kind specified at the city of New York, under the firm name selected, until after the debt to the plaintiff was contracted. Between May 23, 1882, and December 6, 1883, the plaintiff

loaned money to George Caffe on account of which the defendants conceded that there was due the plaintiff January 1, 1884, $26,799.93, to recover which this action was brought. The defendants interposed two defenses: (1) That the partnership or business relation, whatever it was, which had existed between them before May 16, 1882, was on that day dissolved with the knowledge of the plaintiff; (2) that a husband and wife cannot, under the law of this State, be partners in business, and that, although they agree to become so, transact business and incur liabilities as such, the wife is not liable to the creditors of the firm. The first question—an issue of fact—was contested before a jury, and determined in favor of the plaintiff. The second question, an issue of law, was decided in favor of the plaintiff at the circuit, which ruling was affirmed at the general term. From this judgment the defendants appealed to this court.

*William Tharp*, for appellants.

*Abram Kling*, for respondent.

FOLLETT, C. J. But a single question is involved in this appeal, which is whether a married woman who contracts a debt with her husband in a business carried on for their joint benefit, can avoid liability for it on the ground of coverture. The second section of chapter 90 of the Laws of 1860 provides that "a married woman may * * * carry on any trade or business * * * on her sole and separate account." It is urged that this language is not broad enough to authorize married women to engage in business as partners, or jointly with others, or at least with their husbands, but that the statute simply confers power on them to contract by themselves and apart from others. This construction is too narrow, and fails to express the evident intent of the legislature, which was not to prescribe the mode in which married women should carry on their business, but to free them from the restraints of the common law, and permit them to engage in business in their own behalf as free from the control of their husbands as though unmarried. Before this statute, the profits of their business belonged to their husbands, and the words "sole and separate account" were intended to convey the idea that the beneficial interest of any business in which they might engage

belonged to them and not to their husbands. Since the enactment of this statute, it has been held that husbands and wives may legally contract with each other in reference to their separate estates (*Owen vs. Cawley*, 36 N. Y. 600; *Bodine vs. Killeen*, 53 N. Y. 93); that they may become agents for each other (*Knapp vs. Smith*, 27 N. Y. 277); and that a husband may assign to his wife a chose in action (*Seymour vs. Fellows*, 77 N. Y. 178).

In *Frecking vs. Rolland*, 53 N. Y. 422, it was held that a wife could not escape liability on a joint promissory note given by herself and her husband, in payment for property purchased by her, by reason of her coverture, nor by reason of the fact that she contracted jointly with her husband. In *Scott vs. Conway*, 58 N. Y. 619, the defendant and her husband were engaged in running a theater, under the name of "Mrs. F. B. Conway's Brooklyn Theater," pursuant to a contract by which the profits and losses were to be equally shared between them. To an action brought for the recovery of the value of goods sold, the wife interposed the defense that she was not liable for the debt, because it was not contracted in any trade or business carried on for her sole or separate account or benefit, but for the benefit of a business carried on by herself and husband for their joint benefit. This defense was overruled in the supreme court and in the court of appeals. *Bitter vs. Rathman*, 61 N. Y. 512, was an action for an accounting between partners. The plaintiff, a married woman, had been engaged in business with the defendant under the name of H. Rathman & Co. The trial court found "that the plaintiff, in secret trust for her husband, was the partner of the defendant," and that, "in respect to the public, she was to be regarded as the real partner," and ordered an accounting as to the partnership affairs. GRAY, C., said: "Yet she, having suffered herself to be regarded by the public as a partner, was liable, as such, to the creditors of the ostensible firm; and, having thus exposed herself to such liabilities, if any should be found to exist, she had, to any such extent, no right, as against either the defendant or her husband, to be protected out of the share which would belong to her in her capacity as trustee for her husband, at whose instance she undertook the trust." This case does not decide that a wife may or may not be a partner in business with her husband, but it in effect decides that a married woman may be a partner with a third person, and

that her husband may act as her agent in the business of the firm.

In *Noel vs. Kinney*, 106 N. Y. 74, 12 N. E. Rep. 351, reversing 15 Abb. N. C. 403, an action was brought against the husband and wife on a note signed, "J. P. Kinney & Co.," and payable to the plaintiff. The complaint charged that the defendants were liable, as partners, under the name signed to the note. The husband made default, but the wife answered that she was a married woman, and that the note was executed by her husband. On the trial, the plaintiff put the note in evidence, and it appeared that the defendants were husband and wife, and there was evidence that the note was given for mirrors placed in houses owned by the wife. A motion to dismiss the complaint, on the ground that the note on its face showed that it was not given in respect to her separate business, or her estate, was overruled. In considering this question DANFORTH, J., speaking for a unanimous court, said: "In the case cited (*Frecking vs. Rolland*, 53 N. Y. 422), she became a joint contractor with her husband, but she was as much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her joint contractor was her husband. It was not necessary to inquire, in that case, whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case, both undertook to pay the creditor. Can it make a difference in the measure of liability that, in one case, the married woman entered in her own name, and her husband in his name, in the execution of a joint obligation, and in the other case adopted a name which represents a joint liablity, which may, in effect, also be several? Partners are at once principals and agents,—each represents the other,—and if, in the relation of partnership, there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promisor to fulfill her promise."

Partners are the agents of each other, and are jointly and severally liable for the debts of the firm; these being two of the essential elements of a contract of partnership. It being settled that husbands and wives may be the agents of each other, and that they may bind themselves by joint

contracts entered into with third persons, we see no warrant in the statute for exempting them from liability to creditors for debts incurred by firms of which they are members. It has also been so held in *Graff vs. Kinney*, 37 Hun 405, which affirms 15 Abb. N. C. 397; *Zimmerman vs. Erhard*, 8 Daly, 311, affirmed 83 N. Y. 74. Opposed to these are *Chambovet vs. Cagney*, 35 N. Y. Super. Ct. 474; *Kaufman vs. Schoeffel*, 37 Hun, 140; *Fairlee vs. Bloomingdale*, 67 How. Pr. 292; same case, 14 Abb. N. C. 341, was reversed in 38 Hun 220. Upon principle and authority, we think that when a husband and wife assume to carry on a business as partners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture. The judgment should be affirmed, with costs.

VANN, PARKER and BROWN, JJ., concur.

HAIGHT, POTTER and BRADLEY, JJ., dissent.

NOTE: For other cases to same effect, see Mechem's Elem. of Partn., § 25. Compare with preceding case.

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## WHITTENTON MILLS vs. UPTON.

*Supreme Court of Massachusetts, 1858.*

10 Gray 582, 71 Am. Dec. 681.

Petition by a manufacturing corporation to set aside insolvency proceedings instituted against it and William Mason as partners, upon Mason's petition to restrain the assignee appointed under these proceedings from further meeting with petitioner's estate, and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws, respecting insolvent corporations. The opinion states the facts.

*Bartlett* and *Curtis*, for the petitioners.

*Hoar* and *Gray, Jr.*, for the assignees.

THOMAS, J. This is a petition to this court sitting in equity,

and as such, having by the statute of 1838, c. 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated if the corporation was capable, in law, of entering into and forming such partnership, and for such ends.

But the petitioners say: (1) That the Whittenton Mills could not enter into any legal partnership. (2) That if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created. (3) That if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason, and under the statute of 1838, c. 163, and the acts in addition thereto; such acts respecting only natural persons, and making no provisions for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: "Has a corporation, as one of its usual, inherent powers, the capacity to form a contract of copartnership?" The narrower question, but for this case the practical and pertinent one is: "Can a manufacturing corporation in this commonwealth, incorporated since February, 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the revised statutes, enter into a contract or society of copartnership?"

This corporation was created in March, 1836, as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges, and made subject to all the duties, restrictions and liabilities, set forth in the thirty-eighth and forty-fourth chapters of the revised statutes, passed on the 4th of November preceding, but not to take effect till the first of May, 1836: Stats. 1836, c. 19. This charter, with the provisions of the chapter referred to and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly or by implication, because necessary or usual for the purposes which

the charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation as such can bind the society. In a partnership, each member binds the society as a principal. If, then, this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of chapter 38 of the revised statutes, provides that the business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof, and such other officers, agents, and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing, he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company, and to bind the corporation by his acts, is vested in one not a member of the corporation, nor its officer or agent. Such are the third, fourth and fifth sections, providing how the president and directors, and other officers, agents and factors of the corporation shall be chosen. Such, too, is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the

limit fixed by law, or to reduce it: Secs. 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation, the means of stating which would not be in their power if another principal had the power of creating the debts: Sec. 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess—a provision evidently based upon the ground that the exclusive power to contract debts is vested in such directors, and that they cannot be divested of it, and which is wholly inconsistent with the existence of a power in the corporation to enter into a contract of partnership by which another principal would be created, having equal power to contract debts, and to bind the partnership and the corporation in solido.

Indeed, the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations, is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders and others by officers who are the servants of the corporation, and act in its name and behalf. And the formation of a contract, or the entering into a relation by which the corporation, or the officers of its appointment, should be divested of that power, or by which its franchises should be vested in a partner, with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the statute of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woolen and cotton goods are authorized to carry on certain other manufactures, but this only when four-fifths of the stockholders shall, by vote at a special meeting, called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered did not exist before the statute was passed.

We are, therefore, all of the opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void. * * *

If the assent of all the stockholders were shown to the formation of the partnership—which is not the fact—it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provisions of the insolvent law of 1838, c. 163, and the acts in addition thereto.

The proceedings in insolvency, founded upon the petition of Mason as the partner of said Whittenton Mills, under the firm of William Mason & Co., were illegal, and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

NOTE: For other cases as to the power of corporations to enter into partnership, see Mechem's Elem. of Partn., § 26.

Conceding, however, that a corporation has no implied power to enter into a partnership, it by no means follows that such an arrangement, if wholly executed, may be repudiated by the corporation upon that ground. See *Boyd vs. Amer. Carbon Black Co.*, 182 Pa. St. 206; *Sabine Tram Co. vs. Bancroft*, 16 Tex. Civ. App. 170.

## CATSKILL BANK vs. GRAY.

*Supreme Court of New York, 1851.*

14 Barb. 471.

The facts sufficiently appear in the opinion.

*John Van Vleck* for plaintiff.

*John C. Spencer* for the Ulster Iron Co.

By the Court, WRIGHT, J.

The agreement of September, 1843, is set forth in the complaint, and not being denied by the answer, is to be taken as true. By that agreement the Ulster Iron Company leased to Horace Gray for the term of five years certain real property in Saugerties, in the county of Ulster, on which were mills, machinery and water power for the manufacture of iron. As rent of the demised premises, Gray stipulated to pay to the company "one-fourth part of the net profits arising from the premises, and the manufacture of iron thereon, after deducting all charges, excepting commissions on sales at New York, the personal services of Gray and the general superintendence at Saugerties, which were not to be charged in making up profits." Gray was to provide all the funds necessary for the manufacture of bar iron to the best advantage on the demised premises, and all the necessary capital in cash or otherwise, as should be required for such manufacture. He was authorized to expend in putting the works in order, and in additional machinery, a sum not to exceed $5,000, for which sum so expended, the company was to allow him interest, until the accruing rent should be equal to the expenditure.

It was further stipulated that any loss that might occur should be charged to the profit and loss account, but the company was not to be liable to repay any moneys already previously received by them as rent, or be liable for any loss or deficiency at the end of the demised term. Of the fourth part of the profits which were to be paid as rent, one-half was to be paid annually, and the balance at the end of the term, with in-

terest; such interest to be yearly added to the principal. Gray, in furnishing the capital to carry on the business, was authorized to charge interest on his advances, at the rate of six per cent per annum, and was to allow interest on all moneys in his hands arising from the manufacture. It was also agreed that the Stockbridge and Port Henry pig iron might be used in the manufacture of iron on the demised premises, and if so used should be charged at its fair market price; the price, and all other questions under the agreement, to be decided by Joseph Tuckerman of the city of New York, who was to make up the yearly accounts of the profits.

Is this a stipulation for a proportion of the profits as a measure of compensation for the use and occupation of the demised premises, or is it, in contradistinction thereto, an agreement for a specific interest in the profits as profits? I think that it is clearly of the latter character. The provisions of the agreement look to a direct interest, by the company, in the profits to be actually made from the manufacture of bar iron on the premises. The contract between the parties, is in effect this. A company, incorporated for the manufacture of iron, having mills, machinery and water power, agree with an individual for the use of the same for five years. The object of the contract is the manufacture of iron. The funds needed are to be advanced, the labor performed, and the business actually superintended by Gray. Gray is to procure and disburse the money for the purchase of materials, the payment of workmen, and to meet all the expenses incident to the manufacture, to the best advatage to the parties. An account of the net profits is to be annually made up. In making up this account, Gray is to be allowed by the company, interest on his advance of funds, and to pay interest on all moneys in his hands arising from the manufacture. All charges are to be deducted, except commissions on sales at New York, Gray's personal services and the general superintendence of the establishment. Should a certain description of pig iron be used, it is to be charged in the account at its fair market price, and in case of disagreement as to the price, it is to be adjusted by the person named to make up the yearly account of profits. The losses that might occur are to be charged in the profit and loss account, although the company are not to be liable to repay any moneys already previously received by them, or be liable for any loss or deficiency

at the end of Gray's term. The account of actual profits being annually made up in accordance with the stipulations, the company is to have the one-fourth part thereof.

It is unnecessary to decide whether under this agreement, as between the parties themselves, they would be partners; but as respects third persons, it appears to me that that relation legally exists. What was to be received by the company was only payable out of profits actually made in the manufacture of iron. They had then a direct interest in such profits. As was said in *Dob vs. Halsey* (16 John. 40), "he who takes a part of the profits indefinitely shall by operation of law be made liable for losses; upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the security for the payment of their debts." (See also *Everett vs. Coe*, 5 Denio 180; *Hasketh vs. Blanchard*, 4 East 144.) The case is not like that of *Heimstreet vs. Howland* (5 Denio 68), where one leased a ferry to another, the latter to take charge of the business, pay all the expenses and pay over to the lessor one-half of the gross receipts for ferriage; and it is clearly distinguishable from *Boyer vs. Anderson* (2 Leigh 550) and *Perrine vs. Hankinson*, 6 Halst. 181.

It is urged that the Ulster Iron Company, being a corporation, could not legally form a partnership with an individual. This company was incorporated in 1831, for the purpose of manufacturing iron. It might, therefore, lawfully exercise the powers expressly granted to it, and those necessarily to be implied, to enable it to answer the specific purpose of its creation. I entertain no doubt that under its charter the company was capable of making the contract with Gray set forth in the pleadings. That contract related to the business for which the company was incorporated, and was but a mode of furthering the specific purpose of its creation. Strictly, perhaps, corporations should be, and are, restricted from contracting partnerships with individuals or corporations, and as between the parties to the contract, acting upon equal knowledge, a question of validity might be raised; but a corporation may contract with an individual in furtherance of the object of its creation, the effect of which contract may be to impose upon the company as respects the community, the liabilities of a partner. I cannot think that a corporation may so shape its contracts relating to the business for which it was incorporated as to share jointly

with an individual in the profits of such business; subtract its interest in the profits, from the fund on which the creditors of the concern had a right to rely for the payment of the debts due to them; and when called upon by such creditors, be permitted to escape liability altogether, on the ground that the profits were realized as the partner of an individual, which relation the corporation could not legally occupy. I know of no sound reason why a corporation, more than a natural person, who participates in the profits, as such, of a particular business in which it may lawfully engage, should not be holden liable to the public for losses.

It is further insisted by the counsel for the company that the money was not loaned to the supposed partnership, or to the agent of the partnership as such; that the loans were made to Burt as agent of Horace Gray, on his drafts on H. Gray & Co.; that the transaction was a discount and purchase of negotiable paper, and the plaintiffs' remedy is confined to the paper; that the fact that the money received by Burt was applied to the business of the partnership, does not entitle the plaintiffs to recover it of the copartners. The money sought to be recovered was loaned to Burt, as superintendent of the Ulster Iron Works, and applied by him to the business being conducted under the agreement of September, 1843. The plaintiffs do not seek to directly charge the defendants as parties to the bills of exchange, but on a joint liability for money had and received. The fact that Burt was superintendent of the iron works when the loan was effected and applied, is found by the judge. He was the superintendent or agent at the works, in carrying out the agreement between Gray and the company. The money was obtained by him as such superintendent and applied for their joint and mutual benefit. The bank certainly knew that Burt was acting as the agent of third persons in procuring the loan. He professed to act for others; and it is not unreasonable to conclude that the plaintiffs, in loaning these funds, had regard to the eventual liability of the principals, whoever they might be, if it should become necessary to resort to them.

In *Emly, et al. vs. Lye, et al.*, (15 East 6), the action being upon a bill of exchange drawn by one of the partners of a concern, in his own name, which was discounted by the plaintiffs, and the money went to the use of the firm, it was held that the plaintiffs could not recover, either upon the bill or the money

counts. Lord Ellenborough observed that the counts on the bill had been properly abandoned, for unquestionably on a bill of exchange drawn by one only, it cannot be allowed to supply by intendment the names of others, in order to charge them; and considering it a mere discount or sale of the bill, he also held that there was no joint liability of the defendants for money had and received, and that it was the individual transaction of the partner who drew the bill; and all the other judges expressed similar opinions.

I do not however deem this case in all its aspects similar to the one under consideration. The agreement of September, 1843, contemplated that there should be a general superintendent of the business of manufacturing iron, though as between the parties thereto, payment for his services was not to be charged in making up the account of profits. This superintendent draws the bills that were discounted by the plaintiffs, signing them in the character of superintendent. He must have acted exclusively as the agent of Gray, in drawing and negotiating the bills, to render the facts of this case similar to those of *Emly vs. Lye*. The facts must have shown the transaction to have been a mere discount or sale of bills. But it seems to me necessarily to be implied from the decision of the judge that he found the fact that Burt acted as the agent of the defendants, and not exclusively as the agent of Gray. Whether that finding is sustained by the evidence, is not a question to be entertained on a bill of exceptions.

New trial denied.

Note.—See Mechem's Elements of Partn., § 26.

# IV.

## WHAT CONTRACTS AND ACTS CREATE PARTNERSHIP.

### *1. Of the Construction of Contracts Generally.*

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### ATKINS vs. HUNT.

*Supreme Court of New Hampshire, 1843.*

14 N. H. 205.

Assumpsit on three promissory notes, all dated in the year 1840, and payable to the plaintiffs, or order, and signed "Farmers' and Mechanics' Company, by Greenleaf Cummings, Agent."

There were numerous defendants, all of whom were defaulted except two, who severally pleaded the general issue. It was proved that in the month of August, 1839, the defendants signed written articles of association in trade, under the name and style of "The Farmers' and Mechanics' Store." One of the articles provided as follows: "If any stockholder wishes to withdraw from the concern, he may do so, taking the amount by him paid in, by giving six months' notice of his intent, to the executive committee in writing." It was also provided by the second by-law that each subscriber should become a partner, and the defendant was a subscriber of a certain sum; and article 12 provided that all matters relating to the business of the company should be decided by a major vote of those present at any meeting duly notified, except in relation to certain specified acts.

It was proved that Greenleaf Cummings, who signed the notes, was duly employed from the first of February, 1840, to the first of July, 1841, and acted as agent of the company, provided it shall appear from this case that the company con-

tinued its legal existence, and that the notes in suit were given in pursuance of his agency, for goods purchased to be used in the business of the company.

A verdict was taken for the plaintiffs, upon which judgment is to be rendered, or it is to be set aside and judgment rendered for the defendants, according to the opinion of the Court upon this case.

*Livermore*, for the defendants.

*Morrison*, for the plaintiff.

GILCHRIST, J. The question before the Court is, whether the defendants are liable as partners of the Farmers and Mechanics' Company. The plaintiffs allege that they are thus liable, because it appears that they subscribed certain articles constituting that company; that provision was made for the withdrawal of persons from it; that the business of the company was to be managed according to the vote of those present, and that the second by-law provides that each subscriber shall become a partner. These facts it is said render them liable to the world as partners for the performance of the contracts made by their agent, and constitute them actually partners among themselves.

It is said, on the other hand, that what was done amounted merely to a proposition to form a partnership; that no money was paid in, so as to cause them to be affected by any eventual profit and loss; that no names were published to the world, as those of the partners; that the defendants might have withdrawn at any time, and that consequently they could not be bound by the acts of the agent of the company. The question raised by the case is, whether the defendants were actually members of a partnership.

There is of course an essential difference between a mere proposition to form a partnership, and its actual constitution. Persons may take a deep interest in the objects to be accomplished by the company; may make donations to aid its progress; or may sign their names to subscription papers for the same end, without being liable for debts which other persons may contract in the prosecution of the same purpose. But a difficult question often arises, as to where the proposition to make the contract ends, and the contract itself begins. In *Bourne vs. Freeth*, 9 B. & C. 632, 17 Eng. Com. Law 285 a

prospectus was issued, stating the conditions upon which the company was formed; that the concern was to be divided into twenty shares, to be under the management of a committee, and ten per cent of the subscriptions to be paid in by a certain date. It was held that this prospectus imported only that a company was to be formed, and not that it was actually formed, and that the signature to the prospectus did not indicate to any person who should read it that the signer had become a member of a company already formed. So in a case where all the acts proved and relied on were equally consistent with the supposition of an intention on the part of the defendant to become a partner in a trade or business to be afterward carried on, provided certain things were done, as with that of an existing partnership, it was held that he was not a partner: *Dickinson vs. Valpy*, 10 B. & C. 128, 21 Eng. Com. Law 63, per PARKE, J. And where a prospectus for a company was issued, to be conducted pursuant to the terms of a deed to be drawn up, it was held that an application for shares, and payment of the first deposit, did not constitute one a partner who had not otherwise interfered in the concern: *Fox vs. Clifton*, 6 Bing. 776, 19 Eng. Com. Law, 347. It was an important element in that decision, that the deed was not executed by the defendant who was sought to be charged as a partner. In *Howell vs. Brodie*, 6 Bing. N. C. 44, 37 Eng. Com. Law 272, the defendant from 1829 until 1833 advanced various sums, with a view to a partnership in a market about to be erected; knew that the money was applied toward the erection, and was consulted in every stage. In October, 1833, it was settled by a written agreement that he should have a seventh share of it; but it was held that he was not liable as a partner until October, 1833, although profits had been made but not accounted for to him before that time. Lord C. J. TINDAL mentions the fact that no account of profits was rendered previous to October, 1833, as being in favor of the defendant.

These cases sufficiently illustrate and authorize the general position taken by the defendants, that a mere agreement to constitute a partnership *in futuro* does not make the contracting parties liable as partners. A partnership is a contract, imposing certain liablities upon its members. Whether par-

ties have agreed that they will at some future time enter into such a contract, is a very different question from the one whether they have actually entered into the contract. But we are not called upon to make a critical examination of the numerous cases on the subject of partnership which fall within one or the other of these categories, further than to recognize their division into the two classes referred to. Our opinion is that the defendants are clearly liable as partners, for the acts of Cummings. There was an association doing business under a certain name. The defendants signed the articles which constituted this association, the defendants were subscribers, and a by-law provided that each subscriber should become a partner. The business of the company was to be done in pursuance of a major vote of those present, and an agent was appointed, who purchased goods for the use of the company. Here, then, there was not simply an agreement that a partnership should be formed at some future day, but an actual existing reality, a subscription to articles, making a present association, and a by-law designating the subscribers as partners. A right to participate in the profits of a joint concern is one of the tests of a partnership, where a party has fulfilled all the conditions incumbent on him to perform: *Fox vs. Clifton*, 6 Bing. 776, 19 Eng. Com. Law 233; s. c., 9 Bing. 115; 23 Eng. Com. Law 273, per TINDAL, C. J. The defendants do not appear to have failed in this regard, and upon this case they would certainly be entitled to a share in the profits of the business. It is not necessary that persons should hold themselves out to the world as partners, in order to become liable in that capacity. That is only one mode of charging them, and when that is done it dispenses with the necessity of proving that they actually signed the articles of partnership. In this case, as the defendants were partners in fact, the opinion of the Court is that there should be *judgment on the verdict.*

NOTE: As to contemplated partnerships, see Mechem's Elem. of Partn., §§ 13-14, and cases there cited.

As to when the contract takes effect, see Id. § 34 and cases cited: also Kerrick vs. Stevens, *post;* Chester vs. Dickerson, *ante.*

See also Jacobs vs. Shorey, *post.*

## LANEY vs. FICKEL, *et al.*

*Court of Appeals of Missouri, 1899.*

88 Mo. App. 60.

Appeal from the Knox Circuit Court. Hon. Edwin R. McKee, Judge. Affirmed.

*O. D. Jones*, for appellant.

*Chas. D. Stewart* and *G. R. Balthorpe*, for respondents.

BOND, J. Plaintiff and thirty-nine other citizens of Knox county, Missouri, organized a joint stock company for the purpose of establishing a fruit canning factory, and to that end elected a president, secretary, treasurer, and appointed a committee to locate a site for a building and empowered it to purchase material and employ laborers to erect such building. In the prosecution of these ends the association became indebted to certain laborers and materialmen, and also to a lumber firm, of which plaintiff was a member. All of these accounts were assigned to plaintiff, who brought suit against defendants, and prayed judgment for the several sums so assigned to him. When the fact was developed during the trial by the admission of plaintiff that he was a member of said joint stock company and attended its meetings and consented to what was done by it in the matter of constructing the building and incurring the indebtedness sued for, the trial court directed a verdict for defendants. From a judgment in accordance, plaintiff appealed.

The first question presented is as to the nature of the association in which plaintiff engaged. Under the facts stated it was clearly a joint stock company which went into practical operation so far as to elect officers, construct a building and incur indebtedness. Such associations were recognized at common-law and may exist by statute. The members thereof are liable *in solido* for all of its indebtedness in the same manner as the members of an ordinary partnership. While there is some variance in the authorities as to what steps must be taken before the members become liable in this manner to third parties,

all the cases are agreed that such liability is consummate upon a showing that the member joined the association, attended its meetings and consented to the engagement out of which the liability arose. *Hunnewell v. Willow Springs Canning Company*, 53 Mo. App. 245. The case at bar presents all these elements of liability in plaintiff's connection with the company. He was therefore liable as a copartner with his other associates for the claim sued upon by him, since they were valid obligations against the joint stock company itself. This being so, and there being no pretense that the affairs of the joint stock company had been adjusted or settled, nor that any accounting between its members had taken place, nor that there remained only a single item of dispute, it is obvious that plaintiff could not bring an action at law against any of the members of the association for a liability against it, since the rule is universal that "a partner cannot maintain an action at law against his copartner on a partnership claim or liability." George on Partnership, 302; *Bambrick v. Simms*, 132 Mo. 48; *Rankin v. Fairley*, 29 Mo. App. 587. It matters not in the application of this rule whether the liability of the partnership arose upon a contract dealing with one of its members, or whether the latter purchased a claim against it. In neither can the action at law therefor be maintained. *Lyons v. Murray*, 95 Mo. 23. The ruling of the circuit court in this case is supported by the admission of the foregoing facts made by plaintiff on the witness stand. It was to the effect that the present action, which is strictly a legal one, could not be maintained. It was manifestly correct, and the judgment therefor is affirmed. All concur.

NOTE.—See Mechem's Elements of Partn., §§ 7, 130 and 131.

## SAILORS vs. NIXON-JONES PRINTING CO.

*Appellate Court of Illinois, 1886.*

20 Ill. App. 509.

Action by the Printing Company against Sailors, Woodward and Guibout, to recover for printing done for the "Union Mercantile Agency," under which name it was alleged that defendants were partners. Each of defendants owned an interest in certain books and business of a commercial agency, and on January 2, 1885, they agreed to unite their interests as a partnership under the name of Union Mercantile Agency. It was agreed, however, that for two years Sailors was to be relieved from any participation in the business, and during that time he was neither to share in the management nor in the profits or losses of the business. At the expiration of that time, he was to take an active part. In May, 1885, Guibout ordered the printing for which the action was brought. Guibout, in his deposition, testified that he told the plaintiff when the order was given that the firm consisted of himself, Woodward and Sailors. He also testified that he told Sailors of the order and that the latter agreed to help pay. This Sailors denied. No participation by Sailors in the business was shown. Judgment for plaintiff, and Sailors appealed.

*J. D. Hubbard*, for appellant.

*Flower, Remy & Gregory*, for appellee.

MORAN, J. The contract of January 2, 1885, between Woodward and Guibout and appellant, did not constitute appellant a partner in the business which Woodward and Guibout were to conduct in St. Louis. True, the word "partnership" is used to designate the relation of the parties, but the whole agreement shows plainly that Sailors was a joint owner merely, and that the business was to be conducted wholly by the others, and they were to have the entire profits accruing, and bear all losses that might happen in running the business, till, at the end of two years, Sailors was to come into a participation of the business, and thereafter share the profits and losses of the business that should be done. It was a contract

which bound appellant to become a partner at the end of two years, but such contract would not make him liable for debts contracted before his relation as partner commenced. The agreement is very explicit that he shall not share the profits nor be liable for the losses. He retained only his one-third ownership in the books and good-will of the business, and had no control over its management and no right beyond seeing to the preservation of the property. The fact that the parties to such relation themselves call it a partnership will not make it so. Where the question of partnership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract, and even though parties intend to become partners, yet if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners either in fact or in law: Parsons on Partnership, 91. A partnership *inter se* must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fix the real status of the parties toward each other.

If there is no agreement, then if they deal with each other as partners, sharing losses and profits, their interest will be gathered from their acts, and they will be partners *inter se*. Collyer on Partnership, § 2 and note. A mere community of interest in property will not make the owners partners. There must be an agreement for a joint v nture and to share profits and losses; and in the absence of such a mutual agreement they are mere tenants in common of the property and the act of one will not bind the other: *Chase vs. Barrett*, 4 Paige (N. Y.) 148; *Nichoff vs. Dudley*, 40 Ill. 406; *Smith vs. Knight*, 71 Ill. 149, 22 Am. Rep. 94.

As the contract did not make appellant a partner, he could only be held on the ground that he had held himself out as one, or authorized or assented to his being so held out. Nixon says that he knew appellant was a partner when the books were ordered, but he does not state how he knew it, and it may well be inferred that he only knew from what Guibout told him at the time the books were ordered. The question whether the appellant had been, with his consent, held out as

a partner to the plaintiff, was one of fact for the jury; and it was important that in determining that question the jury should be confined to whatever competent testimony was before them. The statement in Guibout's deposition that he told Nixon that appellant was one of the firm without proof that appellant authorized the statement, was incompetent, and in view of all the evidence in the case was calculated to mislead the jury. A party has a right to insist that irrelevant and incompetent testimony shall be excluded. Incompetent testimony in a deposition, though not objected to when the deposition is taken, may be objected to on the trial. The objection is not as to mere form, it is substantial: *Cooke vs. Orne*, 37 Ill. 186; *Lockwood vs. Mills*, 39 Ill. 602.

Nor did appellant lose his right to have the evidence excluded by failing to object to it when read from the deposition. When incompetent testimony gets into the case in the shape of depositions or otherwise, it is the duty of the Court, when required, at any stage of the trial, to exclude it or direct the jury to disregard it: *Pittman vs. Gaty*, 5 Gilm. 186; *Greenup vs. Stoker*, 2 Gilm. 688; *Wickenkamp vs. Wickenkamp*, 77 Ill. 92.

The refusal of the Court to exclude the evidence on appellant's motion was material error, and, while we are much inclined to the opinion that there was no legal evidence before the jury to support a verdict that appellant was jointly liable, still we prefer to rest the reversal on the error above specified, and remand the case for such further action as the parties may desire to take.

Reversed and remanded.

**Note:** See Mechem's Elem. of Partn., § 41.

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## KERRICK vs. STEVENS.

*Supreme Court of Michigan, 1884.*

55 Mich. 167; 20 N. W. Rep. 888.

Action by Kerrick against Stevens, Riches and McCormick, of whom Stevens alone defended.

Judgment below for the defendants, and plaintiff appeals. The opinion states the facts.

*N. O. Griswold*, for plaintiff.

*T. R. Shields* and *J. C. Shields*, for defendants.

CAMPBELL, J. Defendants were sued as partners for a debt incurred by the firm for machinery furnished by plaintiff for a factory in Hastings, Minnesota. Under the charge of the court below a verdict was rendered for defendants, which depended on a denial of the existence of any partnership liability against Stevens. On the first of March, 1882, the defendants entered into articles which recited the ownership by Riches of a patent for folding ladders, in which he agreed to give the others each one-third interest in Minnesota. Stevens agreed to furnish $5,000 for the purpose of putting up a factory in Hastings, and buying machinery and material, and was not to do any work in the factory unless he chose. Riches was to assist in putting up and setting in order the factory and machinery, and McCormick to attend to sales and manufacture. When the factory was completed they were all to be equal partners. As soon as this was signed the parties begun operations, and bought machinery and property for the purpose of the manufacture, and Riches moved to Hastings from Michigan for that object. In the latter part of May, or early in June, Stevens went there, and spent some weeks, as it is claimed, in looking after the business. He did not furnish the full amount which he agreed to.

The notes in suit were given for machinery purchased for the business and put up in the factory, which was nearly ready for use. There was testimony that during his visit at Hastings Stevens was introduced as a partner, said he was a partner, and acted as a partner, going twice with one of the witnesses to St. Paul to purchase property which was in Hastings, as a site for the factory, and requested the same witness to keep an eye on the operations of the other partners and report to him. In October, 1882, being written to on behalf of plaintiff for payment of this claim, he wrote back a letter treating the matter as a liability of the partnership, urging plaintiff to take back the machinery, and promising to arrange the balance satisfactorily. Evidence was also given that Stevens, on the thirty-first day of July, 1882, sent out various notices that he would not be liable for any future debts. Defendant was allowed to introduce some talk after the contract was

executed, to the effect that the partnership was not to commence until after the factory was finished. But it was not claimed that this was for the purpose of changing the agreement, but only to construe it; and Mrs. Stevens spoke of this as being said both before and after, on the same day.

There are several questions raised on the charges, but one is sufficient to decide the case. The court charged that the written contract did not make the parties partners, but only provided for a future partnership after the factory should be put in operation. We think it created a partnership from the beginning. It contemplated action to be taken at once and continuously for the joint benefit. Stevens was to furnish the money in advance, and Riches was to give his time and attention to putting up the factory and machinery. These were the capital of the firm to enable it to get into prosperous operation. It would be an anomaly to have capital paid in and expended without any partnership existing, and without any provision for future emergencies or failures. The purpose must be derived from the nature of the agreement, and not from the technical meaning of words as present or future, standing alone. It was quite proper to use future words as to the interest to be owned in future property, but this will not do away with the necessary inference to be drawn from the immediate action of parties and expenditure of time and money in such a way as to be practically lost in case of there being no partnership carried out. We think the partnership began at once.

The judgment must be reversed and a new trial granted.

The other justices concurred.

NOTE: Compare with preceding cases.

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## DURYEA vs. WHITCOMB.

*Supreme Court of Vermont, 1858.*

31 Vt. 395.

This was an action at law brought by A. & W. E. Duryea against Whitcomb, to recover what plaintiffs claimed to be their share of a joint enterprise entered into by plaintiffs,

defendant and one Lewis. Plaintiffs and Lewis resided in New York city and Whitcomb in Vermont. The agreement was that Whitcomb should, on the joint account, buy potatoes in Vermont and New Hampshire, to be sent to New York and other markets. Whitcomb was to have a fixed price per bushel for buying, and the net profits were to be divided in accordance with the contributions of the parties. The auditor who heard the case found defendant indebted to plaintiffs in the sum of $845.45. Defendant claimed that the arrangement constituted a partnership, and that therefore the affairs could not be adjusted in this form of action. The auditor found that the parties said nothing about partnership and that neither of the parties supposed they were forming a partnership or intended to form one. Defendant appealed.

*C. C. Dewey*, and *A. Underwood*, for defendant.

*A. M. Dickey* and *C. B. Leslie*, for plaintiffs.

ALDIS, J. As this is a case where the rights of the partners *inter se* merely are concerned, where no question as to third persons is involved, the criterion to determine whether the contract is one of partnership or not, must be, what did the parties intend by the contract which they made as between themselves?

If we regard the agreement itself, as set forth in the auditor's report, it is clearly a partnership. The agreement was verbal, but by the finding of the auditor may be considered as in writing at this time. Giving to the contract, as stated in the report, the same construction that we should to articles in writing of the same tenor, it appears to us to have every ingredient of a partnership.

The parties all furnish a share of the capital, Whitcomb one-half, Lewis one-quarter, the Duryeas one-quarter. They jointly own the property when purchased. It is purchased in order to be sold again for their joint and mutual benefit, thereby negating the idea of separate control and disposition of their interests in the property purchased, and of separate interests in the proceeds. Each is to share in the final profit or loss; at the close of the season the profits or losses are to be divided, to Whitcomb one-half, to Lewis a quarter, to the plaintiffs a quarter. Each is to aid in selling, and to contribute his aid, skill, and knowledge to get the highest price.

The case of *Griffith vs. Buffum*, 22 Vt. 181, 54 Am. Dec. 64, *post*, where the defendants were held to be partners as between themselves, is not so strong to show a partnership as this; for there the agreement to share in the losses seems to have been implied, whilst here it is expressed.

The fact that each was to be accountable for his own sales, amounts only to this, that each should sell for cash; if either did not, he was to be accountable for his sale as cash. The proceeds of the sales by each would belong to them jointly, not severally. This provision is as consistent with an agreement for a partnership as with any other: *Noyes vs. Cushman*, 25 Vt. 390. So that Whitcomb was to have the control of the potatoes, and to run them to the best market, taking the advice of Lewis and the Duryeas on the subject, is, when we consider where the parties resided, where the potatoes were to be bought, and to what markets they might be sent, and that Whitcomb was to buy them, as consistent with a contract of partnership as with any other.

I. This agreement does not belong to the class of cases where the parties are jointly interested in certain proportions in the property purchased, but not in the final profits or losses; where each of the part owners has the power of separate disposition of his interest. Such is the case of *Coope vs. Eyre*, 1 H. Bl. 37, *post*, a leading illustration of the class.

II. It is not of the class where a party receives a portion of the profits as a compensation for his labor as an agent or servant. Each furnished a portion of the capital, each was a part owner of the property when purchased, and of the proceeds when sold. Neither could be said to be the servant or agent of the other. An agent who receives a share of the profits as a compensation for his services, is not expected to share in losses; if there are no profits he loses his labor or wages, but he loses no more, though there are further losses to be borne by the partners.

Of this class is *Kellogg vs. Griswold*, 12 Vt. 291; and *Mason vs. Potter*, 26 Vt. 722.

III. Nor is it a case where a share of the gross or net earnings is to be paid as a compensation for the use of capital, or as rent; and where the party receiving such compensation has no interests in the business, the property and the proceeds, but only a right of action against the other parties. Here the

parties jointly contributed capital, labor, and skill, were joint owners of the property from the time of its purchase till the final division of profits or loss. No severance of their interests could be had, no ascertainment of their respective shares or interests could be made till a final accounting. They must have relied on the property and its proceeds to secure to each his final share, no matter by whom the property might be sold, or its proceeds held.

Hence the cases of *Tobias vs. Blin*, 21 Vt. 544; *Bowman vs. Bailey*, 10 Vt. 170, and *Ambler vs. Bradley*, 6 Vt. 119, do not apply. Of the same class are *Denny vs. Cabot*, 6 Met. (Mass.) 92; *Holmes vs. The Old Colony R. R. Co.*, 5 Gray (Mass.) 58; *Loomis vs. Marshall*, 12 Conn. 69, 30 Am. Dec. 596, and various other cases cited by counsel.

It is said, however, that the auditor finds that the parties did not intend to form a partnership, and that such intention must govern.

It is with contracts of partnership as with all other contracts, that as between the parties to them their intention must govern. Hence an express stipulation in a contract that the parties thereto shall not thereby become partners, is binding and of great significance in giving construction to the instrument, especially if the terms are doubtful or susceptible of more than one meaning.

1. It is to be noted that in this case there was no such express stipulation. The auditor's report says, "at the time of the arrangement in New York, August 20, 1854, nothing was said about a partnership, and neither of the parties at that time supposed they were forming a partnership, or intended to form a partnership." As nothing was said about a partnership, the parties could not have stipulated that their contract should not create one.

2. The report states what was the arrangement of August 20, 1854. That was a contract for a partnership. If their contract was for a partnership by necessary legal construction (which we have found that it was), and they intended to make the contract (and this appears from the report), the legal effect of their contract could not be varied by their not supposing it to be what it was. The further statement in the report that they did not intend to form a partnership seems inconsistent with the other facts. One is at a loss to perceive how the

auditor could discover such an intention when nothing was said about a partnership, and when the contract, which they made, was a partnership. Probably the fair construction of the report is that the parties were not aware of the legal extent and obligation of the contract into which they entered.

As the contract imports a partnership, we must hold, in the absence of any express stipulation and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses.

IV. The action is book account. The accounts presented for adjustment are all partnership accounts. None of them are properly chargeable on book. The case of *Green vs. Chapman*, 27 Vt. 236, has settled the construction of the statute of November 18, 1852, viz.: that where there are no items properly chargeable on book, the action of book account will not lie for the adjustment of other items proper for the action of account.

The result is that the judgment of the county court is reversed and judgment rendered for the defendant to recover his costs.

NOTE: See Mechem's Elem. of Partn., § 43, as to the effect of contracts. See also Jacobs vs. Shorey, *post*.

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## 2. *Of their Effect in Creating Partnership.*

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### GRACE vs. SMITH.

*King's Bench, Easter Term, 1775.*

2 Wm. Bl. 998.

ASSUMPSIT for goods sold and delivered. Motion for new trial after a verdict for the defendant.

This was an action brought against Smith alone as a secret partner with one Robinson, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of March,

1767, Smith and Robinson entered into partnership for seven years, but in the November afterward, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only. Smith was to have back £4,200 which he brought into the trade, and £1,000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4,000, part of this £5,200, or let it remain in his hands for seven years at five per cent interest, and an annuity of £300 per annum, for the same seven years. For all which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times, to enable him to pay the partnership debts, Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. On the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one, viz., £5,200 due to him on the dissolution of the partnership, £1,500 for the remaining five years of the annuity, and £300 for Smith's share of a ship; in all £7,000, for which Robinson gave a bond to Smith. On the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

*Davy*, for the plaintiff, insisted that the agreement between Robinson and Smith was either a secret continuance of the old partnership, or a secret commencement of a new one, being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade, and to receive for it twelve and a half per cent profit, which could not be fairly done unless it be understood to arise from the profits of the trade; and that he ought therefore to be considered as a secret partner. And he relied much on the case of Bloxham & Fourdrinier against Pell & Brooke, tried at the same sittings (7th of March, 1775) before Lord MANSFIELD in the King's Bench, as in point. "This was also a partnership for seven years between Brooke & Pell; but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at

five per cent, which was accordingly done. And it was further agreed that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord MANSFIELD held that Pell was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it shall not lie in the defendant Pell's mouth to say, 'It is usury and not a partnership.'"

*Gross* and *Adair*, for the defendant, argued that the present case is very distinguishable from that of Bloxham and Pell. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given, as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual; it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of Robinson. It is not a necessary dilemma, that it must be either usury or partnership. It may be, and probably was, a premium for the good will of the trade Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial that it appears to have been rated at £1,000 to each partner in the space of less than eight months. And whether that sum is agreed to be paid at once, or by seven instalments, it is the same thing. Besides, whether there be or be not a secret constructive partnership is a question proper for a jury, who have here decided it on a consideration of all the circumstances.

DR GREY, C. J. The only question is: What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo* or *left behind* in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said that this is not payable out of the profits, and I think there is no foundation for granting a new trial.

GOULD, J., same opinion.

BLACKSTONE, J., same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount.

NARES, J., same opinion. Rule discharged.

NOTE: Compare with following cases. See also, Mechem's Elem. of Partn., §§ 5, 6, *et. seq.*

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## COOPE vs EYRE.

***English Court of Common Pleas, 1778.***

**1 H. Bl. 37.**

Action by Coope and others against Eyre, Atkinson, Walton, Hattersley, Stephens, and Pugh, to recover the purchase price for a shipload of oil, purchased in the name of Eyre & Co. Eyre & Co., composed of Eyre, Atkinson & Walton, had become bankrupt, and did not defend, so that the real defendants were Hattersley & Co. (Stephens) and Pugh & Co. (Pugh's son). These defendants contended that the contract of sale was made by the plaintiffs with Eyre & Co. only, and that the contract between these defendants and Eyre & Co. was not such as to create a partnership. Verdict for defendants under direction of the court (Lord LOUGHBOROUGH), and motion made for a new trial on the ground of misdirection.

*Adair*, for the motion.

*Bond* and *Le Blanc*, contra.

GOULD, J. The facts of the present case are shortly these: The defendants and Eyre & Co. order one Garforth, a broker, to buy quantities of oil. The defendants, Hattersley & Co.

and Pugh & Co., were to have for their respective shares each one-fourth. The broker buys divers shiploads; and to some of the vendors, the defendants during the treaty declare it to be a common concern between them and Eyre & Co., in whose name the purchases were made. But with respect to the plaintiff's, the purchase was made singly in the name of Eyre & Co., without any notification that the defendants had any concern in it. These purchases were made on speculation, there being a prospect that oil would rise in price; but it afterwards fell, and then the defendants contend that they are not liable to make good the difference, Eyre & Co. having failed.

Upon these facts, two questions arise: 1st. Whether the defendants are partners with Eyre & Co.? 2d. If not, whether they are to be deemed joint contractors in the purchase for Eyre & Co. and so liable for the whole?

As to the first, I think they cannot be considered as partners with Eyre & Co. in this purchase from the plaintiffs. Although there may be partnerships in many other instances besides what are merely commercial, as in the case of farms rented by several persons jointly, and of partnerships of attorneys, and the like, yet I think the true criterion is as stated by Mr. Justice BLACKSTONE, in the case of *Grace vs. Smith*, *ante*, "whether they are concerned in profit and loss," and the same doctrine is in effect held by Chief Justice DE GREY, in that case. This is strongly illustrated by *Bloxam vs. Pell*, which was cited in *Grace vs. Smith*. [Here follows a statement of these two cases.] It was held in both the cases that the inequality of the concern as to profit and loss was immaterial to those who dealt with them, however, it might be a regulation between themselves. But in the present case there was no communication between the buyers as to profit or loss. Each party was to have a distinct share of the whole, the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one might be more or less than that of the other. In this light I am of the opinion there is no foundation for the court to adjudge the present case a partnership; and the jury having found for the defendants, there is no reason to disturb the verdict. [The second question was also answered in the negative.]

HEATH, J., said, among other things: This is a sub-con-

tract—by a sub-contract I mean a contract subordinate to another contract made or intended to be made between the contracting parties on one part, or some of them, and a stranger. Eyre & Co. are the only purchasers known to the plaintiffs; entire credit was given to them alone; Pugh, Hattersley and Stephens can be liable only in the event of a concealed partnership, on this principle, "that the act of one partner binds all his copartners on account of a communion of profit and loss." In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity and not in the subsequent disposition of it.

Lord LOUGHBOROUGH. The first impression on my mind was against the defendants, but in the course of the trial my opinion changed, and I thought they were not liable as partners; I still continue to think so, and consequently that the verdict was proper.

This being an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has been justly observed that a secret partnership can be no consideration to the vendor, though for reasons of policy and general expedience the law is positive with respect to the secret partner that when discovered he shall be liable to the whole extent. In many parts of Europe, limited partnerships are admitted, provided they be entered on a register, but the law of England is otherwise, the rule being that if a partner shares in advantages he also shares in all disadvantages. In order to constitute a partnership a communion of profits and loss is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. * * * Here Eyre was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them necessary to make them partners; their agreement was a sub-contract which, as my Brother HEATH observed, may be executory; it was to share

in a purchase to be made. The seller looked to no other security but Eyre & Co.; to them the credit was given, and they only were liable.

WILSON, J., dissented.

New trial denied.

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## WAUGH vs. CARVER.

*English Court of Common Pleas, 1793.*

2 H. Bl. 235.

Assumpsit by Waugh against Erasmus Carver, William Carver and Archibald Giesler, as partners. It appeared that the two Carvers were in business at Gosport, and Giesler at Plymouth as shipping agents. On February 24, 1790, these parties entered into a written agreement which provided that Giesler should remove to Cowes, and that thereafter the two concerns should coöperate in the transaction of the ship agency business. In consideration of the Carvers' recommendation and assistance to support the house at Cowes Giesler was to allow the Carvers a moiety of the commission on ships putting into that port, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills employed on such ships; he also agreed to advise with the Carvers, and to pursue such measures as might appear to them to be to the interest of all concerned. On the other hand, the Carvers agreed to pay Giesler three-fifths of the proceeds from all vessels which should come from Cowes to Portsmouth, and put themselves under the direction of the Carvers upon the recommendation of Giesler, one-half per cent on all trademen's bills, and a certain proportion of warehouse rent, etc. They were to meet once a year at Gosport to settle their accounts and pay over the balance. It was expressly agreed also that neither should in any way be liable for the losses of the other or in any way accountable or responsible for the acts of the other, but that each should "in his own proper person and with his own goods and effects, respectively, be answerable and accountable for his own losses, acts, deeds and receipts."

Plaintiff sold goods, etc., to Giesler in his own name, but not being paid he sued him and the Carvers as partners. The question was whether they were partners on a true construction of the articles.

*Clayton* and *LeBlanc*, for the plaintiff.

*Rooke* and *Lawrence*, for the defendants.

EYRE, Ch. J. This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was whether, by construing this to be a partnership, we should not determine that if there was an annuity granted out of a banking house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

The definition of a partnership cited from Puffendorf (Lib. 5, cap. 8) is good as between the parties themselves, but not with respect to the world at large. If the question were between A and B, whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labor, and on what agreements they were to divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is, generally, not between the parties as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to those funds. Now, a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discus-

sion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case therefore is reduced to a single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of *Grace vs. Smith*, *ante*, he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace vs. Smith*, and I think it stands upon the fair ground of reason. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profits and loss. A ship agent employs tradesmen to furnish necessaries for the ship; he contracts with them and is liable to them; he also makes out their bills in such a way as to determine the charge of commission to the ship owners. With respect to the commission, indeed, he may be considered as a mere agent, but as to the agency itself he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts in the transactions with him as with any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him as well as to the owners.

If, therefore, the principle be true that he who takes the general profits of a partnership must of necessity be made liable to the losses in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though with respect to each other these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

The other judges concurred.

NOTE: See Mechem's Elem. of Partn., §§ 5, 6, *et seq.*

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## COX vs. HICKMAN.

*English House of Lords, 1860.*

8 H. of L. Cas. 268.

This was an action brought by Hickman against Cox and Wheatcroft to recover upon three bills of exchange, given by one of the managers of the Stanton Iron Company, for goods supplied to that company. The declaration contained a count in the usual form as against acceptors on each bill, alleging it to have been "directed to the defendants by and under the name of the Stanton Iron Company;" also counts for goods sold and delivered, and the money counts. The defendants severed in pleading, each denying the acceptance of the bills, and, as to the other counts, pleading never indebted.

For some time previously to the year 1849, Benjamin Smith and Josiah Timmis Smith carried on business at the Stanton Iron Works, in Derbyshire, as iron masters and corn merchants, under the name of B. Smith & Son. In that year they became embarrassed in their circumstances, and a meeting of their creditors took place. Among these were Cox and Wheatcroft. On the 13th November, 1849, a deed of arrangement was executed by more than six-sevenths in number and value of the creditors. The parties to this deed were the Smiths, of the first part; Francis Sanders, John Thompson, James Haywood, David Wheatcroft, and Samuel Walker Cox, all of whom were creditors, of the second part; and the general creditors (includ-

ing those previously named as trustees), whose names were also set forth in a schedule, of the third part. The deed recited a lease from 1846 for twenty-one years to the Smiths; that they were unable to pay their debts, and that it had been agreed that there should be an assignment by them to the parties of the second part, as trustees on behalf of the creditors, to have and hold the premises for the term of the lease, the machinery, etc., and all the estate, etc., subject to the powers and provisions thereinafter contained. The trusts were then enumerated, and, in substance, they were to carry on the business under the name or style of "The Stanton Iron Company," with power to do whatsoever was necessary for that purpose, and to pay the net income, after answering all expenses; which net income was always to be deemed the property of the two Smiths, among the creditors of the Smiths. And provision was made for the meeting of the creditors, and, at any such meeting, a majority in value of the creditors present was to have the power to make rules as to the mode of conducting the business, or to order the discontinuance of it. And when all the debts had been paid, the trustees were to hold the trust estates, etc., in trust for the two Smiths. The deed contained a covenant by the parties executing it, not to sue the Smiths for existing debts. Cox never acted as trustee; and Wheatcroft resigned six weeks after the execution of the deed, and before the goods for which the bills were given had been supplied; no new trustee was appointed in the room of either. The business of the company was carried on by the three other persons named as "parties of the second part." In the course of it goods were supplied by Hickman, who, in March, April, and June, 1855, drew three bills of exchange in respect thereof. The first of these bills, which was the same in form as those afterwards accepted, was in these words:

"Grafton Iron Ore Works, Blisworth,
"£300. 10th March, 1855.

"Four months after date pay to my order, in London, three hundred pounds, value received. JOHN HICKMAN."

"To the Stanton Iron Company, near Derby."

The acceptance was in the following form: "At Messrs. Smith, Payne & Co., London. Per proc. The Stanton Iron Company.—JAMES HAYWOOD." The cause was tried in 1856, before the late Lord Chief Justice JERVIS, when a verdict was

found for the defendants; but on motion on leave reserved, the verdict was entered for the plaintiff (18 C. B. 617).

The case was taken to the Exchequer chamber, when three judges, Justice COLERIDGE, ERLE, and CROMPTON, were for affirming the judgment of the Common Pleas, and three other judges, Barons MARTIN, BRAMWELL, and WATSON, were for reversing it. [8 C. B. N. S. 523.] The judgment, therefore, stood, and was afterwards brought up to this House.

The judges were summoned, and Lord Chief Baron POLLOCK, Mr. Justice WIGHTMAN, Mr. Justice WILLIAMS, Mr. Justice CROMPTON, Mr. Baron CHANNELL, and Mr. Justice BLACKBURN, attended.

*The Attorney-General* (*Sir R. Bethell, Mr. Millward* was with him), for Wheatcroft.

*Mr. Welsby* (*Mr. Boden* was with him) for Cox.

*Mr. Rolt* (*Mr. Field* was with him) for the respondent in both cases.

The Lord Chancellor (Lord Campbell) proposed the following question for the judges: "Are the defendants in this case liable as acceptors of the bills of exchange declared upon?"

Agreed to.

BLACKBURN, J. The defendants in this case are liable as acceptors of the bills of exchange declared upon. The question entirely depends on the effect of the deed of arrangement. If the effect of that deed is such that creditors executing it thereby give authority to those managing the Stanton Iron Company, to bind them to third persons in the usual course of business by accepting bills, the defendants have given such authority. If the effect of the deed is not such that creditors executing that deed give authority to bind them as to third persons, the defendants are not shown to have given any such authority, for they have never acted as trustees; nor does it appear that they have done any act beyond what was proper to carry out the arrangement contained in that deed.

The principal object of the deed of arrangement is to divide the property of the Smiths amongst the creditors according to the rules observed in bankruptcy; and for this purpose their property is assigned to trustees. The good will of the business which had been carried on by the Smiths was part of

their joint estate, and those who had the making of the arrangement appear to have thought it a valuable part of the joint estate. Instead of disposing of it to third persons, or suffering it to be lost, the arrangement made was, that the business should in the future be carried on under a new style, that of "The Stanton Iron Company," by the trustees, in the manner stipulated for in the deed to which the creditors are parties. The question is, whether the stipulations are such as to render those creditors, who are parties to the deed, partners in the Stanton Iron Company, so far, at least, as regards liability to third persons.

Some of the judges in the court below have expressed an opinion that there is a distinction between the present question and that which would have arisen if the question had been whether the defendants were liable for the consideration of these bills. I am, however, of opinion that no such distinction exists. I apprehend that all cases as to liability of partners to contracts are branches of the law of agency, and that the question always is, whether the contract entered into is within the scope of the authority conferred by those, who are sought to be charged, upon the persons actually making the contract. But I take it that, as matter of law, those who are partners in a trading firm, do confer upon those who are permitted to manage the concern authority to make all contracts which, in the exigency of the business, are necessary and proper and customary. The *prima facie* authority may be restricted by express agreement, but unless those who deal with the firm have notice of this restriction, they are entitled to hold all who are partners bound by the *prima facie* authority conferred on the manager, and that equally whether the persons sought to be charged were persons to whom the creditors gave credit, or dormant partners, of whose existence they were unaware. I think the justice of this rule, as applicable to dormant partners, very questionable, but I do not think it open to question that it is the rule of law. I think that where, as in the present case, the accepting of bills is a necessary and customary part of the business, the authority to accept them is conferred as much as the authority to contract the debts for which they are given. It is true the authority is limited to accepting the bills in the name of the firm, and binds

only those included in that firm, but all who are partners are included in the firm.

I think, therefore, as already said, that the question is, whether the stipulations in the deed are such as to constitute a partnership quoad third persons, and to determine that question we must look to the terms of the deed. The material stipulations, as it seems to me, are the following: [The provisions of the deed are then quoted.]

These, I think, are the whole of the material parts of the deed. There is no stipulation in the deed, as to who is to provide for payment of the partnership liabilities in case the losses should be so great as to exceed the sum of £4,000, which the trustees were authorized to retain for the purpose of carrying on the business. The parties seem not to have anticipated, or at all events not to have provided for such a contingency, which, though a probable one, is often overlooked by those entering on a trade, but the rule of law is clear enough, that those who are partners in the concern must bear such liabilities; so that I once more repeat, the question comes round to whether the stipulations are such as to constitute a partnership amongst the creditors.

Now, on looking at the provisions of the deed, it seems to me that they are, in substance, such as would be proper if the creditors constituted themselves a joint stock company, such as it would have been at common law, and made the trustees their managing directors, but agreed that the partnership should cease as soon as a certain sum, in this case the amount of their debts, was realized. I find that the business is to be carried on by the trustees under the control of the creditors, who may give what directions they think fit as to the management of the business; that the creditors are to have a voice in nominating fresh trustees in case they are changed; and that the creditors are to have a right to inspect the books. And, moreover, I find that the creditors alone are to have these powers, no similar powers being given to the Smiths. Then I find also that the trustees are bound to pay over the net income, after paying all expenses of the concern, ratably among the creditors. It was suggested at your Lordship's bar, that there was some distinction between the net income, after paying all out-goings, and the net profits, but I am unable to understand what that distinction is.

The arrangement is that the trading might terminate on the creditors being paid, which perhaps was the termination which the persons entering into the arrangement hoped for. In that case, the deed provides that the property shall be made over to the Smiths, but by so doing the trade of the Stanton Iron Company ceases. Whoever the partners in that firm might be, they are no longer to carry on the business after the property is assigned to the Smiths. It might terminate by the concern being stopped by the creditors whilst it was yet solvent; that event is anticipated by the deed, and in that case it is provided that the surplus, after paying all losses, should be divided amongst the creditors. It might continue for an indefinite period, neither so productive as to pay the creditors in full, nor so bad as to be stopped; and whilst it was so continued, the creditors were to have the net income or profits, and the control of the management of the concern, and they were only to have these powers. Does this make them interested in the property or profits so as to make them partners? That question depends on the effect of the deed, and it will be answered when we have determined the extent of their interest in the property of the firm. Suppose, a not impossible case, that the trustees had, as individuals, contracted a joint debt for some purpose unconnected with the Stanton Iron Company; could the partnership property of the Stanton Iron Company have been taken to pay the debt? Or, if the trustees had become reduced to one person, and he had become a bankrupt, would the assets of the Stanton Iron Company have passed to his assignees? Or would the creditors, who are parties to the deed of arrangement, have been entitled in either case to say that the property was in equity theirs, and that the trustees, except in so far as they were creditors, had no beneficial interest in it? That is a question that depends on the construction of the deed. I think the construction of the deed is such, that the creditors, parties to the deed, have bargained that they shall have a hold over the whole property of the firm, divided or undivided, and I think this bargain is effectual, and, if so, that the creditors do take the profits of the concern, so as to make them their property before they are divided.

The deed does not provide what is to be done in the case which has actually happened, viz.: That of the concern proving insolvent; but the law declares that those who take the

profits of a trading concern as such are liable to the losses, even if they have stipulated to the contrary. *Waugh vs. Carver*, Smith's Lead. Cas. 786, *ante*, and the notes thereto.

The phrase, taking the profits as such, is not a happy one, and there is some difficulty at times in defining what it means, but I think it means at all events this. It is not possible, according to the common law, to cause a trading concern to be carried on, on the terms that the advantages of a partnership, including the participation in profits, and the partnership lien and security over the assets of the firm, shall belong to those who have but a limited liability. I am aware of no case or authority inconsistent with the proposition thus guarded. Now, it seems to me, that the present defendants have, by the deed to which they are parties, stipulated that the business shall be carried on for their benefit, and under their control; that they shall be interested in all the property of the firm to such an extent as to have a partnership lien upon it.

This shows that they are not merely persons permitting the Smiths or the trustees to carry on the business and relying on it as a fund for payment, but that they take the profits as such, and having done so, they are partners as regards third persons. I agree that the question is one of agency, viz., whether the defendants authorized the managers of this firm to bind them; but I think it is an incident attached by law to a participation in the profits to the above extent, that such authority is given to those managing the concern. I think, for the reasons I have given, that this arrangement deed does amount to a stipulation for a participation in the profits as such by the creditors.

For these reasons, I am of opinion that the defendants are liable as acceptors of the bills of exchange declared upon.

Lord CRANWORTH. In this case the judges in the court of exchequer chamber were equally divided, and unfortunately the same difference of opinion has existed among the learned judges who attended this house during the argument at your lordships' bar. Except, therefore, from an examination of the grounds on which their opinions are founded, we can derive no benefit in this case from their assistance. We cannot say that in the opinions delivered in this house, there is more authority in favor of one view of the case than of the other. We must not, however, infer that your lordships have not

derived material aid from the opinions expressed by the judges. These opinions have stated the arguments on the one side and the other with great clearness and force, and what we have to do now is to decide between them.

In the first place let me say that I concur with those of the learned judges who are of the opinion that no solid distinction exists between the liability of either defendant, in an action on the bills, and in action for goods sold and delivered. If he would have been liable in an action for goods sold and delivered, it must be because those who were in fact carrying on the business of the Stanton Iron Company were carrying it on as his partners or agents; and, as the bills were accepted, according to the usual course of business, for ore supplied by the plaintiff, I cannot doubt that if the trade was carried on by those who managed it as partners or agents of the defendant, he must be just as liable on the bills as he would have been in an action for the price of the goods supplied. His partners or agents would have the same authority to accept bills in the ordinary course of trade, as to purchase goods on credit.

The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade.

This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are, by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business.

In the case now before the house, the court of common pleas decided in favor of the respondent that the appellant, by his execution of the deed of arrangement, became, together with the other creditors who executed it, a partner with those who conducted the business of the Stanton Iron Company. The judges in the court of exchequer chamber were equally divided, so that the judgment of the court of common pleas was affirmed. The sole question for adjudication by your lordships is, whether this judgment thus affirmed was right.

I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place there is an assignment by Messrs. Smith to certain trustees, of the mines and all the engines and machinery used for working them, together with all the stock in trade, and in fact all their property, upon trust, to carry on the business; and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. Smith, as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. Smith.

Up to this point the creditors, though they executed the deed, are merely passive; and the first question is, what would have been the consequence to them of their executing the deed if the trusts had ended there? Would they have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, *i. e.*, the net profits should be applied in discharge of their demands? I think not; it was argued that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly

correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued, or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management.

These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed they consented to abandon that right, and to allow the

trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms as to the mode in which the trust to which they had agreed should be executed. I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act if he considered the terms prescribed by the creditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable; it could not be contended that this would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such a power to be reserved to a third person, and reserving it to themselves.

I have, on these grounds, come to the conclusion that the creditors did not, by executing this deed, make themselves partners in the Stanton Iron Company, and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement, like that now before us, are, I believe, of frequent occurrence; and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable as partners.

This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so; but the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favor of the appellant. The deed now before us was executed by above a hundred joint creditors; and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this; but, at least, it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors I see is the Midland Railway Company, which is a creditor for a sum only of £39, and to suppose that the directors could imagine that they were making themselves partners is absurd.

The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents. This was certainly the case in *Waugh vs. Carver*, 2 H. Bl. 235, *ante*. There Messrs. Carver, who were ship agents at Portsmouth, agreed with Giesler, a ship agent at Plymouth, that if he would establish himself as a ship agent at Cowes, they would share between them the profits of their respective agencies in certain stipulated proportions. When, therefore, Geisler, in pursuance of the agreement, did establish himself at Cowes, and there carry on the business of a ship agent, he, in fact, carried it on for the benefit of Messrs. Carver as well as of himself; and the court held that, in these circumstances, the stipulation which they had entered into that neither party to the agreement should be answerable for the acts of the other, was a stipulation which they could not make so as thereby to affect third persons. Each firm was carrying on business on account not only of itself but also of the other firm; this, therefore, made each firm the agent of the other.

The case of *Bond vs. Pittard*, 3 M. & W. 357, could admit of no doubt. The question was, whether G. H. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys. They had agreed to become partners on a stipulation that P. H. Watts should always receive £300 yearly out of the first profits as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners; but the court held the contrary. Each of them worked for the common benefit of both, and each of them, therefore, acted as agent of the other. The produce of the labor of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt.

A similar principle explains and justifies the decision of the Court of Common Pleas in *Barry vs. Nesham*, 3 C. B. 641. The question was, whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the

printer and publisher of a newspaper. Nesham had sold the stock and good will of the paper to Lowthin, in consideration of £1,500, and on a further stipulation, that for seven years the profits were to be applied as follows: that is to say, Lowthin was to have the first £150 of the annual profits, then Nesham was to have them to the extent of £500, if they made so much, and Lowthin was to have all beyond. It is clear that Lowthin was conducting the business for the common benefit of both, subject to their private arrangements as to the shares they should separately be entitled to; Lowthin was, therefore, clearly the agent of Nesham.

*Owen vs. Body* is at most a case in which a dictum may be found. The Court of Queen's Bench was quite right in holding that the creditors were justified in refusing to execute the deed tendered to them; and that is all which was decided.

None of the other cases cited carried the doctrine farther than those I have referred to, and I therefore think that in this case the judgment appealed against ought to be reversed.

Lord WENSLEYDALE. These two cases come before your lordships on appeal from the Exchequer chamber by which court a judgment of the court of common pleas was affirmed. They both involve the same question. The court of common pleas was unanimous in favor of the plaintiff below. The court of exchequer chamber, consisting of six learned judges, and the six learned judges who have given their advice to your Lordships, have been equally divided. I am of opinion that the judgment of the court of common pleas was wrong, and that it ought to be reversed.

The question is, whether either of the defendants, Cox or Wheatcroft, was liable as acceptor of certain bills of exchange, dated in March, April, and June, 1855, drawn by the plaintiff below on the Stanton Iron Company, and accepted by one James Haywood as *per proc* that company. And the simple question will be this, whether Haywood was authorized by either of the defendants, as a partner in that company, to bind him by those acceptances.

Haywood must be taken to have been authorized to accept for them by those who actually carried on business under that firm. Were the appellants partners in it? The case will depend entirely on the construction of the deed of the 13th November,

1849. There is no other evidence affecting either of them. And the question is, whether the subscription of both, as creditors of the Smiths, made them partners in the business carried on by the trustees in the name of the Stanton Iron Company. Wheatcroft could not be liable in the character of trustee, for he had ceased to be such before the bills were drawn, and the plaintiff knew it.

The terms of the deed have been so fully brought before your lordships, that I do not consider it necessary to state them at any length. One of the provisions in the deed was this authority to the trustees to execute all contracts and instruments in carrying on the business, which would certainly authorize the making or accepting bills of exchange.

The question then is, whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents, to bind them by acceptances on account of the business.

The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice STORY lays it down in the first section of his work on Partnership. He says: "Every partner is an agent of the partnership, and his rights, powers, duties, and obligations, are in many respects governed by the same rules and principles as those of an agent; a partner virtually embraces the character of both a principal and agent." Pothier says: *"Contractus societatis non secus ac contractus mandati."* Pand. lib. 17, tit. 2, Introduction.

A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole

or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner.

Can we then collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; for, if it is profitable, they may get their debts paid; but this is not that sharing of profits which constitutes the relation of principal, agent, and partner.

If a creditor were to agree with his debtor to give the latter time to pay his debt till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him his agent to contract debts in the way of his trade; nor do I think that it would make any difference that he stipulated that the debtor should pay the debt out of the profits of the trade.

The deed in this case is merely an arrangement by the Smiths to pay their debts, partly out of the existing funds, and partly out of the expected profits of their trade; and all of their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed, the payment of their debts. These effects are placed in the hands of the trustees as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to constitute the relation of principal and agent between the creditors and trustees. The trustees are certainly liable, because they actually contract by their undoubted agent; but the creditors are not, because the trustees are not their agents. The case of *Owen vs. Body*, 5 A. & E. 28, on which some reliance was placed, is really no authority for holding that the creditors by subscription became

actually partners. In the short judgment of Lord DENMAN, the expression used is not that the deed imposed such conditions as would have constituted a partnership amongst those who subscribed it, but as might have had the effect, which is a much more doubtful expression. It was quite enough for the decision of that case, that the subscription exposed them to the peril of being considered partners, of which peril the opinions of a majority of the judges leave no doubt; and that prevented the deed from being a fair deed, and good against creditors. So did the provision that the effects which ought to have been divided equally amongst the creditors, should be put in peril by being employed in trade.

The case of *Janes vs. Whitbread*, 20 Law J., N. S., C. P. 217, which was distinguished as authorizing a trader to wind up, can hardly be supported on the ground of that distinction. It exposed the creditors signing to perils, though not in the same degree.

The case of *Bond vs. Pittard*, 3 M. & W. 357, cited on the part of the plaintiff, turned entirely upon the special circumstances, it being perfectly clear that both the two attorneys, of whom the plaintiff was assignee, were the parties with whom the contract was made, independent of the circumstance of a payment of fixed sums being made to one out of the profits. It was not that fact that was considered to make them partners; it was not necessary to decide that point.

I, therefore, advise your lordships to reverse the judgment.

CROMPTON and WILLIAMS, J. J., gave opinions concurring with BLACKBURN, J., in holding the defendants liable.

CHANNELL, B., WIGHTMAN, J., POLLOCK, Ch. B., Lord Chancellor CAMPBELL, Lord BROUGHAM and Lord CHELMSFORD gave opinions holding the defendants not liable.

Judgment reversed.

NOTE: See Mechem's Elem. of Partn., §§ 58, 62.

## BEECHER vs. BUSH.

*Supreme Court of Michigan, 1881.*

45 Mich., 188, 40 Am. Rep. 465, 7 N. W. Rep. 785.

Action by Bush against Beecher and Williams to charge the latter as partners for goods supplied by Bush. Judgment for plaintiff and Beecher appeals.

*H. M. Cheever, John Atkinson* and *J. P. Whittemore*, for defendant.

*W. B. Jackson* and *C. I. Walker*, for plaintiff.

COOLEY, J. The purpose of the action in the court below was to charge Beecher as partner with Williams for a bill of supplies purchased for the Biddle House in Detroit. The facts are all found by special verdict, and are few and simple. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in the course of the business made this purchase. The proposals are set out in full in the special verdict.

The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case, therefore, is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership these parties meant should be wholly excluded from their arrangement. Some of these were of primary

importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should "carry the doctrine of constructive partnership so far as to render it a trap to the unwary:" KENT, C. J., in *Post vs. Kimberly*, 9 Johns. (N. Y.) 470, 504.

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not, therefore, a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law.

What then are the *indicia* of partnership in this case; the marks which force that construction upon the court irrespective of the intent of the parties; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies?

In the elaborate and able brief which has been presented

in behalf of the defendants in error, it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits, and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in *Hinman vs. Littell*, 23 Mich. 484; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions: *Eager vs. Crawford*, 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words: *Loomis vs. Marshall*, 12 Conn. 69, 79, 30 Am. Dec. 596.

In *Cox vs. Hickman*, 8 H. L. Cas. 268, 306, *ante*, Lord CRANWORTH stated very clearly his views of what should be the test of partnership. "It is often said," he says, "that the test, or one of the tests whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf—*i. e.*, that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

It is said, and we believe justly, in *Bullen vs. Sharp*, L. R. 1 C. B. 86, that the decision in *Cox vs. Hickman* brought back the law of England to what it should be, and Mr. Baron BRAMWELL, referring to what was declared to be law in *Waugh vs. Carver*, 2 H. Bl. 235, 2 Smith's Lead. Cases, 9th Amer. ed. 1178, *ante*, expressed the hope "that this notion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books:" p. 128. It is certainly overruled very conclusively in Great Britain: *Kilshaw vs. Jukes*, 3 B. & S. 847, 118 Eng. Com. L. 846; *Shaw vs. Gault*, 16 Irish C. L. R. 357; *Holme vs. Hammond*, L. R. 7 Exch. 218; *Ex parte* Delhasse, 7 Ch. Div. 511. And though in New York, the courts, hampered somewhat by early cases, have not felt them-

selves at liberty to adopt and follow the decision in *Cox vs. Hickman* to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. Indeed, that is very well shown in *Eastman vs. Clark*, 53 N. H. 276, 16 Am. Rep. 192, where the authorities are collated. It must be admitted, however, that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. A few cases may be mentioned which, in their facts, have a resemblance, more or less strong, to the one before us.

*Champion vs. Bostwick*, 18 Wend. 175, 31 Am. Dec. 376, was a case where parties who were severally owners of horses and stages on different parts of one stage line made an arrangement that the fares received by both should be divided between them in proportions agreed upon. This was held to constitute them partners, so that a third person injured by the carelessness of a driver employed by one might bring suit for the negligence of all. But in the somewhat similar case of *Eastman vs. Clark*, 53 N. H. 276, 16 Am. Rep. 192, the conclusion of partnership or no partnership, it was said, must be drawn as one of fact. "The real and ultimate question," says SMITH, J. (p. 289), "in all cases like the present, is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation existed is a question of fact. * * * There is no sound foundation for an arbitrary rule of law requiring courts or juries to regard participation in the profits as a decisive test which will, in all instances, necessitate the conclusion that the participator is liable for the debts."

In *Farmers' Ins. Co. vs. Ross*, 29 Ohio St. 429, it appeared that by arrangement one party furnished the ground and the material for making brick, and also the fuel, and another was at the expense of burning the brick. The brick were then to be divided, the former receiving one-fourth and the latter three-fourths, and the latter was also to pay the former ten dollars on each one hundred thousand bricks. This was held to create a partnership, and *Musier vs. Trumpbour*, 5 Wend. 274, and *Everitt vs. Chapman*, 6 Conn. 347, were relied upon as authority.

The New York cases might support this decision, but the case of *Loomis vs. Marshall*, 12 Conn. 69, 30 Am. Dec. 596, can hardly be considered in accord with it. The facts were these: B had a cloth factory. A agreed with him to furnish a full supply of wool for two years, B to devote the factory for two years exclusively to manufacturing and the net proceeds, after deducting the incidental expenses and costs of sale, were to be divided in the proportion of 55 per centum to A and 45 per centum to B, and the cost of manufacture was to be shared in like proportion. This was held no partnership. Says HUNTINGTON, J.: "This community of profit is the test to determine whether the contract be one of partnership; and to constitute it a partner must not only share in the profits, but share in them as a principal; for the rule is now well established that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner." And of the share set off to B he says it "is not expressed in terms to be for such compensation; but this is its legal meaning:" pp. 77, 79. *Moore vs. Smith*, 19 Ala. 774; *Bowman vs. Bailey*, 10 Vt. 170, and *Price vs. Alexander*, 2 Greene (Ia.), 427, 52 Am. Dec. 526, may be referred to for similar views.

One of Chief Justice GIBSON's short but very lucid opinions is in point here. Between Bronson, a manufacturer, and Dunham, a country merchant, there was an agreement that the former should furnish wooden handles made to order to the latter, at a tariff of prices to be paid out of the store, on the proceeds of the handles; Bronson finding the labor and stuff, and receiving a further compensation for skill and the rent of the storehouse, in the form of a commission of fifty per centum on the net profits of the whole. It was sought to charge Dunham as a partner with Bronson for the price of raw material the latter had bought. Upon these facts it is said: "Now, it has been so often and so invariably ruled in England and America that a commission on profits is not such an interest in the concern as constitutes partnership that the point is at rest. What staggers the mind in this instance is the apparent shallowness of the distinction when it is considered that a commission of fifty per cent is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle; and

that, whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same. But by the terms of the contract Bronson and not Dunham was to procure and pay for the stuff; and they were not to be partners in that part of the business. This provision, I admit, would be inoperative against strangers, if the parties had held themselves out to the public as partners, both in buying and selling; but assuming for the moment that there was indeed a partnership in the handles when furnished, and in the store when stocked with goods, yet it is to be borne in mind that the handles, as well as the store goods, were to be put into the concern as separate contributions to the joint stock; and that, as the stuff for the handles was to be procured by Bronson it was consequently to be paid for by him, just as the store goods were to be procured and paid for by Dunham, having been purchased on separate account. There may be a partnership for selling and not for buying; or for buying and not for selling; or for both buying and selling, which is the most usual: as if several put separate quantities of wheat into a common stock to be ground into flour and sold on joint account; or agree to buy jointly and divide the article when bought; or agree to buy and sell on joint account. In the first case each would be liable for his own purchases only; but in the second and third cases, each would be liable for the whole. Now if there were any partnership in this instance it would be of the first class; and in any view of the case the defendant would not be liable:" *Dunham vs. Rogers*, 1 Pa. St. 255, 262.

Not dissimilar to this is the case of *Denny vs. Cabot*, 6 Met. 82, which was also a case in which one party supplied the raw materal and another manufactured it, and was to receive one-third part of the net profits. This proportion, it was found, was to be received by the manufacturer only as a compensation for his labor and services; and it was held perfectly competent to provide for making compensation by such a standard without constituting a partnership. *Perrine vs. Hankinson*, 11 N. J. 181, is relied upon as authority, among other cases. The same doctrine was reiterated in *Holmes vs. Old Colony R. R. Co.*, 5 Gray 58; *Bradley vs. White*, 10 Met. 303, 43 Am. Dec. 435; and by DAY, J., in a careful opinion in *Harvey vs. Childs*, 28 Ohio St. 319, *post*, already referred to.

It is needless to cite other cases. They cannot all be recon-

cited, but enough are cited to show that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective had been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exist, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the other and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the mutual arrangement does it appear that either of the parties clothed the other with an agency to act on his behalf in this business? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive, or receive one that Williams rejected as unfit? In short, what one act might he do or authority exercise which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be

principal in a business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and, therefore, have not deemed it necessary to exclude.

On the other hand, what single act are we warranted in inferring the parties understood Williams was to do for, and as the agent of, Beecher? Not to furnish supplies surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be met by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of his contract. If the business was managed badly Beecher might be a loser, but how could he help himself? He had reserved no right to correct the mistakes of Williams, supply his deficiencies, or overrule his judgments. He did, indeed, agree to take and account for whatever furniture should be brought into the house by Williams, but the bringing any in was voluntary and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration of that which Beecher supplied; and it was quite possible that, as between himself and Williams, there might be nothing to pay. And while Williams was not compellable to put any in, Beecher, on the other hand, had no authority to put any in at the cost of Williams.

It is plain, therefore, that if there is any agency in this case

for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of their plain intent that none shall exist. If, therefore, we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else is a mere absurdity. The test of partnership must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary; and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked anyone of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams. Being in possession he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies or for servants' wages; and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which William's assent was required.

There is another view of this case that seems to us conclusive. It is urged on behalf of defendants in error that Beecher was a dormant partner. Now a dormant partner is a secret partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business. Was this the case here? Nothing in the record indicates it. Beecher was in possession of the hotel, and we must suppose had his clerk there. These were facts open and patent to the whole world who had occasion to go there or to deal with Williams. They naturally suggested the inquiry what was the arrangement between the parties;

and there is nothing in the case to indicate that plaintiffs in error would not have learned all the details of the arrangement had they made the necessary inquiries. There is no indication anywhere of intended secrecy. If, therefore, there was any partnership at all, it existed because the contract and the open and public conduct of business under it created one, and the right of the defendants in error to recover must depend upon whether they had a right, with the contract before them, to understand that they were furnishing supplies on the credit of Beecher. Would they have had this right? If so, no interference of Beecher, and no notice to them not to sell to Williams relying on Beecher's credit, would have been of the least avail. If he had said to them, "Gentlemen, by our contract, Mr. Williams furnishes all the supplies; I do not and cannot control in respect to quality, quantity, or cost; he alone, by our understanding, is to pay for them, and I forbid you to sell on my credit;" it would all have been useless. On their view of the case he was bound by an iron rule of the law, from which it would have been impossible to rescue his credit until the arrangement with Williams should in some manner be terminated. And this would have been the case also even if the arrangement with Williams had been a secret one, and Beecher had attempted to protect himself by disclosing its terms. This is as much as to say that parties are not at liberty to contract as they please, even when they propose nothing wrong and do nothing unfair to any one. But we cannot bring our minds to this result.

Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts or by deceptive appearances.

The judgment must be reversed with costs and a new trial ordered.

NOTE: See Mechem's Elem. of Partn., § 63.

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## HARVEY vs. CHILDS.

*Supreme Court of Ohio, 1876.*

28 Ohio St. 319, 22 Am. Rep. 387.

Action for money. The case is sufficiently stated in the opinion of the court.

*Matson & Dirlam*, for plaintiff in error.

*Brinkerhoff & Dickey*, for defendants in error.

DAY, J. The original action was brought by Harvey against Childs and Potter, to recover $158.40, for seventeen hogs sold by Harvey to Potter.

Potter is in default. Childs denies his liability. His liability is claimed solely on the ground that he was a partner of Potter in the adventure for which the hogs were purchased.

The partnership claimed rests on the following state of facts: Potter went to Childs, and told him that he had contracted for about two car loads of hogs, to be delivered at Loudonville the next day, and had not the money to pay for them. He asked Childs to advance the money and take an interest in the hogs. Childs refused. Thereupon Potter proposed that if he would let him have the money to enable him to pay for the hogs he had bought, and others he might have to buy to make the two car loads, he (Childs) should take possession of the hogs when carred at Loudonville, as security for the money, take them to Pittsburg, sell them, and take his pay from the proceeds of the sale; that he might have one-half the net profits of the adventure, and that in no event should Childs sustain any loss, but the money advanced by him should be fully paid by Potter in case the amount realized from the sale of the hogs was insufficient. Childs accepted the proposition, and, it being agreed that $2,500 would be enough

to pay for the two car loads he advanced that sum to Potter. Afterward, without the knowledge of Childs, Potter bought the hogs in question of Harvey, on his own credit, and they made part of the two car loads of hogs which were taken possession of by Childs, sold in Pittsburg, and the avails of the sale were appropriated in payment of the money advanced to him. No profits were made. The avails of the sale were insufficient to pay the amount advanced by Childs, and Potter paid him the deficiency, and for his time and expense in the transaction.

The question to be considered, then, is, are the defendants, by construction of law, to be regarded partners as to the plaintiff, being a third person, in the debt incurred to him by Potter in his own name?

What shall be regarded, as to third persons, a test of partnership between parties who did not consider themselves to be partners, and who have done nothing to estop them from denying that they are such has been much discussed by courts and elementary writers, and the problem seems to be one of difficult solution. It is needless to review here the numerous cases on the subject; a statement of results is sufficient.

No little difficulty has been experienced in determining the meaning and limits of phrases that have been recognized as tests of a partnership in such cases, and in their application to the varying cases that arise.

The effort has been to draw a distinct line between cases where one has a community of interest in the profits of a business, as distinguished from those where one is entitled to receive a sum of money out of the profits as a creditor, or a sum proportioned to a *quantum* of profits, or a share of the profits as a compensation for services or labor.

Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other, as being each principal and agent. That relation, it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged.

But if the relation of principal and agent be regarded as

the test of a partnership and consequent joint liability, the question still remains, what shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question?

To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor. Pars. on Part. 71, and note; Coll. on Part., secs. 25, 44. See, also, Story on Part., secs. 36, 38, 60; *Berthold vs. Goldsmith*, 24 How. 536.

But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting, in the particular transaction, as the agent or on behalf of the party sought to be charged. Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustain that relation, a joint liability may be said to have been incurred by the authority, or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American, is to this conclusion.

The case of *Cox vs. Hickman*, decided by the House of Lords in 1860, has become a leading case on the subject. 99 E. C. L. 47; 8 House of Lords Cases, 268. It is summarized in the subsequent case of *Bullen vs. Sharp*, L. R. 1 C. P. 86, by BLACKBURN, J., as follows: "I think that the *ratio decidendi* is that the proposition laid down in *Waugh vs. Carver*, viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord CRANWORTH, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining the question, but not being in itself deci-

sive; the test being, in the language of Lord WENSLEYDALE, whether it is such a participation in the profits as to constitute the relation of *principal and agent* between the persons taking the profits and those actually carrying on the business." Add. on Cont. 163.

These cases were decided before the passage of the act of parliament in relation to partnerships. But, so far as relates to this question, in a subsequent case, BRAMWELL, J., declared, in effect, that the act was only declaratory of the common law, as held in *Cox vs. Hickman*. *Holme vs. Hammond*, L. R. 7 EX. 218.

The question was much considered in *Eastman vs. Clark*, 53 N. H. 276, where the authorities are fully collated and ably reviewed. The case was decided in 1872. The conclusion arrived at is stated by SMITH, J., as follows: "The real ultimate question in all cases like the present is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of the question; except so far as it is evidence of the relation of principal and agent between the persons, taking the profits and those actually carrying on the business. Whether such relation actually exists is a question of fact. Upon the trial of that question, proof of a right to participate in the profits would be a cogent and often practically conclusive piece of evidence to establish the existence of that relation, but there is no sound foundation for an arbitrary rule of law requiring courts or jurors to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In the absence of any known stipulation to the contrary, every party of a trading firm, within the scope of the joint business in contemplation of law, is clothed with implied authority to enter into simple contracts on behalf of the firm in furtherance of the business of the partnership, and thereby bind each member of the firm. Where, therefore, as in the case of *Wood vs. Vallette*, 7 Ohio St. 172, and in the later case of *Leggett vs. Hyde*, 58 N. Y. 272, money is advanced, to be used in a trading business, and returned in a year with a share of the profits made during that time, it may well be implied that the business was conducted on behalf and by the

authority of the person advancing the money and sharing the profits, for it is to the continuing trade, in the ordinary way, that he looks for his profits.

But such cases are plainly distinguishable from one where money is advanced, to be embarked in a single transaction, where no credit is contemplated. In such case there is no ground for the implied authority to incur debts, such as exists in regard to a general trading business. Add. on Cont. 161.

In the case before us it is obvious that it was not contemplated in the arrangement between Childs and Potter that any indebtedness should be incurred in the purchase of hogs for the contemplated adventure, to which the whole business was to be confined. There is, then, no ground for the implication of authority from Childs to incur the debt in question. On the contrary, such implication is rebutted by the advancement of money to pay for all the hogs that were to come to his hands.

Moreover, Childs had no legal interest in any of the hogs until they were delivered to him at the cars, nor had he any equitable interest in hogs, before such delivery, that were bought by Potter and not paid for by money received from Childs. He had, then, no interest whatever in the hogs bought of Harvey on credit, when the debt to him was incurred; and Potter, before delivery to Childs, might have sold them without being liable to Childs. The fact is apparent that it was the understanding of the parties that Potter had bought for himself, and, if need be, was in like manner to buy enough more hogs to make two car loads; and it cannot be doubted that, until their delivery at least, all the hogs belonged to Potter alone, and at most were only regarded as his contribution to the enterprise. If so regarded, the case is like that of *Wilson vs. Whitehead*, 10 M. & W. 503, where it was agreed between three parties that one should edit, another print, and the other publish a paper, and share equally in the net profits. The printer was to furnish the paper and charge the firm at cost prices. It was held that the printer alone was liable to the person of whom he bought the paper. PARKE, B., said: "The question is, did the other defendants authorize Whitehead to purchase the paper on their account or on his own. It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his possession

he was at liberty to have appropriated it to any other purpose."

But the truth is, Potter was the owner of the hogs until they were sold by Childs, for Childs declined to take any interest in the hogs other than as security for the money advanced by him to Potter. Looking to the whole matter, it is clear that the transaction was a loan of money by one party to the other, on the security afforded by the possession of the hogs. Childs, therefore, was the mere pledgee of the hogs, with a power of sale by agreement of the parties, and, as such, had only special property in the hogs. The general property in the hogs, from first to last, remained in Potter. He was the owner, and if they had died on the way to market, without the fault of Childs, the loss would have fallen upon Potter, both by the positive agreement of the parties, and the legal effect of the transaction between them as bailor and bailee.

There was, then, strictly speaking, no mutuality or community of interest between them in the hogs. Childs had no interest in them other than as security for a debt, and to find in half the profits of their sale the measure of his reward for the use of his money, to be paid out of Potter's property.

The relation of the parties was that of debtor and creditor, of bailor and bailee, and not that of partners. They had no mutual interest in the hogs in common as principals or proprietors, nor was either acting as principal for himself and agent for the other. If, however, that relation could be said to exist after the hogs were delivered to Childs, there is no ground for an inference that the debt to Harvey, previously contracted by Potter, was incurred upon the authority of Childs. On the contrary, the facts rebut any implication of such authority, and are consistent only with the supposition that the debt was incurred without authority from Childs, who was doubtless no less surprised to learn of the debt than Harvey was, after the failure of Potter, to find the existence of a rule of law under which he had unwittingly given credit to another and responsible party. We may, in conclusion, therefore, well adopt in this case the language of Judge STORY (Part., sec. 36): "Now, it is incumbent upon those who insist that a partnership exists between the parties, as to third persons, by mere operation of law, in opposition to their own intention, to establish that in the given case, under all the

circumstances, there is such a rule, and that it is strictly applicable."

This disposes of the material questions made by the record. The court of common pleas gave judgment in favor of the plaintiff, against both Childs and Potter.

The District Court, on error reversed the judgment as to Childs. It follows that the judgment of the District Court must be affirmed.

Judgment accordingly.

NOTE: See Mechem's Elem. of Partn., §§ 64, 65.

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## MEEHAN vs. VALENTINE.

*Supreme Court of the United States, 1892.*

145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972.

This was an action of *assumpsit* brought by Thomas J. Meehan, a citizen of Maryland, against John K. Valentine, executor of William G. Perry, both citizens of Pennsylvania, alleging Perry to have been a partner with Lawrence W. Counselman and Albert L. Scott, under the name of L. W. Counselman & Co., and counting on promissory notes of various dates from August 10, 1883, to November 25, 1884, signed by that firm, indorsed to the plaintiff, and amounting in all to about $10,000, with interest. The defendant denied that Perry was a partner in the firm.

At the trial, the plaintiff put in evidence the following agreement:

"L. W. Counselman, Albert L. Scott, Office of L. W. Counselman & Co., Oyster and Fruit Packers, corner Philpot and Will streets. Baltimore, Md., March 15, 1880. For and in consideration of loans made and to be made to us by Wm. G. Perry, of Philadelphia, amounting in all to the sum of ten thousand dollars, for the term of one year from the date of said loans, we agree to pay to said Wm. G. Perry, in addition to the interest thereon, one-tenth of the net profits over and above the sum of ten thousand dollars on our business for the year commencing May 1st, 1880, and ending May 1st, 1881,—

*i. e.*, if our net profits for said year's business exceeds the sum of ten thousand dollars, then we are to pay to said W. G. Perry one-tenth of said excess of profits over and above the said sum of ten thousand dollars; and it is further agreed that if our net profits do not exceed the sum of ten thousand dollars, then he is not to be paid more than the interest on said loan, the same being added to notes at the time they are given, which are to date from the time of said loans, and payable one year from date. L. W. Counselman & Co."

Also the following indorsement thereon: "March 2, 1881. This contract and agreement is to continue one year longer on the same basis,—*i. e.*, from May 1st, 1881, until May 1st, 1882. L. W. Counselman & Co."

Also three further renewals of the agreement from year to year, the first of which was by letter, dated March 18, 1882, from L. W. Counselman & Co. to Perry, with the same heading as the original agreement, and saying: "We hereby renew the agreement made with you May 1, 1880, which is to the effect that we will guarantee you ten per cent. interest upon loans amounting to $10,000; and that if the net profits of our business are over $10,000 for the year commencing May 1, 1882, and ending April 30th, 1883, we will in lieu of the ten per cent. interest give you ten per cent. of the profits. We have two propositions for partnership May 1st, and if we accept either we will then, if you desire, return your loan."

The other renewals, dated April 4, 1883, and March 15, 1884, were substantially like the original agreement of March 15, 1880, except that in the agreement of April 4, 1883, the rate of interest was specified as 6 per cent.

The plaintiff further offered in evidence six promissory notes, amounting in the aggregate to $10,600, given by the firm to Perry in the months of March, May, and June, 1884.

The plaintiff also called Scott as a witness, who testified that the firm was composed of L. W. Couselman and himself; that it was engaged in "the fruit and vegetable packing and oyster business" in Baltimore; that Perry was in the stationery business in Philadelphia; that the $10,000 mentioned in the agreement was paid by him to the firm, receiving their notes for it, and remained in the business throughout, no part of it having been repaid; that from time to time he lent other sums to the firm, which were repaid; that he was an intimate friend of the

witness, and visited him every few weeks; that these visits were not specially connected with the business, though on such occasions Perry "usually went down to the place of business and talked business;" that he annually asked and received from the firm accounts of profit and loss; that the accounts showed an annual profit, which varied from year to year, amounting for the second year to $11,000 or $12,000; that, it being then found difficult to tell at the end of the year exactly what the profits would be, it was agreed with Perry that he should thenceforth receive $1,000 each year, leaving the final settlement until the whole business was settled up; and that he received under the agreement about $1,500 the first year, and $1,000 each subsequent year. On cross-examination, the witness stated that the firm made an assignment to the plaintiff for the benefit of creditors on April 30, 1885; that their liabilities were from $60,000 to $70,000, about half of which was with collateral security, and he did not know whether it had been paid out of such security; that the assets realized less than $2,000; that, so far as he knew, no dividend had been paid; and, in regard to the $10,000 received from Perry, the witness testified as follows: "Question, Mr. Counselman and yourself did owe this $10,000 to the estate of Mr. Perry, did you? Answer. They had my notes for it. Q. Did you or did you not owe it? A. It was capital he had in the business the same as ours. We owed it to him; of course we owed it to him, if we did not lose it."

At the close of the plaintiff's evidence, the defendant moved for a nonsuit, on the ground that there was no evidence to show that Perry was liable as a partner. The court so ruled, and ordered a nonsuit. 29 Fed. Rep. 276. The plaintiff duly excepted to the ruling, and sued out this writ of error.

*S. Shelabarger* and *J. M. Wilson*, for plaintiff in error.

*Samuel Dickson* and *R. C. Dale*, for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The granting of a nonsuit by the circuit court, because in its opinion the plaintiff had given no evidence sufficient to maintain his action, was in accordance with the law and practice of Pennsylvania, prevailing in the courts of the United States

held within that state, and is subject to the revision of this court on writ of error. *Central Trans. Co. vs. Pullman's Car Co.*, 139 U. S. 24, 38-40, 11 Sup. Ct. Rep. 478. The real question in this case, therefore, is whether the evidence introduced by the plaintiff would have been sufficient to sustain a verdict in his favor.

The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. *Ward vs. Thompson*, 22 How. 330, 334.

Some of the principles applicable to the question of the liability of a partner to third persons were stated by Chief Justice MARSHALL in a general way, as follows: "The power of an agent is limited by the authority given him; and, if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others." "A man who shares in the profit, although his name may not be in the firm, is responsible for all its debts." "Stipulations [restricting the powers of partners] may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law." *Winship vs. Bank*, 5 Pet. 529, 561, 562. And the chief justice referred to *Waugh vs. Carver*, 2 H. Bl. 235, *ante; Ex parte* Hamper, 17 Ves. 403, 412; and Gow. Partn. 17.

How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story, Partn. c. 4; 3 Kent, Comm. 25, note, 32-34; *Ex parte* Hamper, above cited; *Pott vs. Eyton*, 3 C. B. 32, 40; *Bostwick vs. Champion*, 11 Wend. 571, and 18 Wend. 175,

184, 185; *Burckle vs. Eckart*, 1 Denio 337, and 3 N. Y. 132; *Denny vs. Cabot*, 6 Metc. (Mass.) 82; *Fitch vs. Harrington*, 13 Gray 468, 474, 74 Am. Dec. 641; *Brundred vs. Muzzy*, 25 N. J. Law, 268, 279, 675. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent. *Benjamin vs Porteus*, 2 H. Bl. 590, 592; Coll. Partn. (1st Ed.) 14; Smith, Merc. Law, (1st Ed.) 4; Story, Partn. § 55; *Loomis vs. Marshall*, 12 Conn. 69, 78, 30 Am. Dec. 596; *Burckle vs. Eckhart*, 1 Denio, 337, 341; *Hallet vs. Desban*, 14 La. Ann. 529.

Accordingly, this court, at December term, 1860, decided that a person employed to sell goods under an agreement that he should receive half the profits, and that they should not be less than a certain sum, was not a partner with his employer. "Actual participation in the profits as principal," said Mr. Justice CLIFFORD in delivering judgment, "creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits," or "may have expressly stipulated with his associates against all the usual incidents to that relation. That rule, however, has no application whatever to a case of service or special agency, where the employé has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." *Berthold vs. Goldsmith*, 24 How. 536, 542, 543. See, also, *Seymour vs. Freer*, 8 Wall. 202, 215, 222, 226; *Beckwith vs. Talbot*, 95 U. S. 289, 293; *Edwards vs. Tracy*, 62 Pa. St. 374; *Burnett vs. Snyder*, 81 N. Y. 550, 555.

Mr. Justice STORY, at the beginning of his Commentaries on Partnership, first published in 1841, said: "Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction

between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. Pothier considers partnership as but a species of mandate, saying *contractus societatis, non secus ac contractus mandati.*" Afterwards, in discussing the reasons and limits of the rule by which one may be charged as a partner by reason of having received part of the profits of the partnership, Mr. Justice STORY observed that the rule was justified and the cases in which it had been applied reconciled, by considering that "a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances;" but that it is not "to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as of itself overcoming or controlling them;" and therefore that, "if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled." And again: "The true rule, *ex æquo et bono*, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story, Partn. §§ 1, 88, 49.

Baron PARKE (afterwards Lord WENSLEYDALE) appears to have taken much the same view of the subject as Mr. Justice STORY. Both in the court of exchequer and in the house of lords he was wont to treat the liability of one sought to be charged as a dormant partner for the acts of the active partners as depending on the law of principal and agent. *Beckham vs. Drake*, (1841), 9 Mees. & W. 79, 98; *Wilson vs. Whitehead*, (1842), 10 Mees. & W. 503, 504; *Ernest vs. Nicholls*, (1857), 6 H. L. Cas. 401, 417; *Cox vs. Hickman*, (1860), 8 H. L. Cas. 268,

312, *ante*. And in *Cox vs. Hickman* he quoted the statements of Story and Pothier from Story, Partn. § 1, above cited.

In that case, two merchants and copartners, becoming embarrassed in their circumstances, assigned all their property to trustees, empowering them to carry on the business, and to divide the net income ratably among their creditors, (all of whom became parties to the deed), and to pay any residue to the debtors, the majority of the creditors being authorized to make rules for conducting the business or to put an end to it altogether. The house of lords, differing from the majority of the judges who delivered opinions at various stages of the case, held that the creditors were not liable as partners for debts incurred by the trustees in carrying on the business under the assignment. The decision was put upon the ground that the liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them; and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. *Cox vs. Hickman*, 8 H. L. Cas. 268, 304, 306, 312, 313, nom. *Wheatcroft vs. Hickman*, 9 C. B. (N. S.) 47, 90, 92, 98, 99.

This new form of stating the general rule did not at first prove easier of application than the old one; for in the first case which arose afterwards one judge of three dissented, (*Kilshaw vs. Jukes*, 3 Best & S. 847;) and in the next case the unanimous judgment of four judges in the common bench was reversed by four judges against two in the exchequer chamber, (*Bullen vs. Sharp*, 18 C. B. [N. S.] 614, and L. R. 1 C. P. 86). And, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Kelly, C. B., and Cleasby, B., in *Holme vs. Hammond*, L. R. 7 Exch. 218, 227, 233; Jessel, M. R., in *Pooley vs. Driver*, 5 Ch. Div. 458, 476. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the rela-

tion of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.

In the case last above cited, Sir George Jessel said: "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners,—a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity." And in a very recent case the court of appeals of New York, than which no court has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract, *Bank vs. Thompson*, 121 N. Y. 280, 24 N. E. Rep. 473.

In other respects, however, the rule laid down in *Cox vs. Hickman* has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. In re English & Irish Society, 1 Hem. & M. 85, 106, 107; *Mollwo vs. Court of Wards*, L. R. 4 P. C. 419, 435; *Ross vs. Parkyns*, L. R. 20 Eq. 331, 335; *Ex parte* Tennant, 6 Ch. Div. 303; *Ex parte* Delhasse, 7 Ch. Div. 511; *Badeley vs. Bank*, 38 Ch. Div. 238. See, also, *Davis vs. Patrick*, 122 U. S. 138, 151, 7 Sup. Ct. Rep. 1102; *Eastman vs. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Wild vs. Davenport*, 48 N. J. Law, 129, 7 Atl. Rep. 295, 57 Am. Rep. 552; *Seabury vs. Bolles*, 51 N. J. Law, 103, 16 Atl. Rep. 54, and 52 N. J. Law, 413, 21 Atl. Rep. 952; *Morgan vs. Farrell*, 58 Conn. 413, 20 Atl. Rep. 614.

In the present state of the law upon this subject, it may, perhaps, be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their

debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. *Perrine vs. Hankinson*, 11 N. J. Law, 215; *Holmes vs. Railroad Co.*, 5 Gray, 58; *Beecher vs. Bush*, 45 Mich. 188, 7 N. W. Rep. 785, *ante*. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. *Wilson vs. Edmonds*, 130 U. S. 472, 482, 9 Sup. Ct. Rep. 563; *Richardson vs. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267; *Curry vs. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343; *Cassidy vs. Hall*, 97 N. Y. 159; *Smith vs. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Williams vs. Soutter*, 7 Iowa 435, 446; *Smelting Co. vs. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Mollwo vs. Court of Wards*, and *Badeley vs. Bank*, above cited.

In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. *Beauregard vs. Case*, 91 U. S. 134; *Hackett vs. Stanley*, 115 N. Y. 625, 627, 628, 633, 22 N. E. Rep. 745; *Pratt vs. Langdon*, 12 Allen, 544, and 97 Mass. 97, 93 Am. Dec. 61; *Rowland vs. Long*, 45 Md. 439. And in *Mollwo vs. Court of Wards*, above cited, after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look

at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." L. R. 4 P. C. 438. But in the case at bar no such element is found.

Throughout the original agreement, and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for which they gave him their promissory notes, is spoken of as a loan, for which the partnership was to pay him legal interest at all events, and also pay him one tenth of the net yearly profits of the partnership business, if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreement, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business. The legal effect of the instrument could not be controlled by the testimony of one of the partners to his opinion that "it was capital he had in the business the same as ours; we owed it to him; of course, we owed it to him if we did not lose it."

Upon the whole evidence, a jury would not be justified in inferring, on the part of Perry, either "actual participation in the profits as principal," within the rule as laid down by this court in *Berthold vs. Goldsmith*, or that he authorized the business to be carried on in part for him or on his behalf, within the rule as stated in *Cox vs. Hickman* and the later English cases. There being no partnership, in any sense, and Perry never having held himself out as a partner to the plaintiff or to those under whom he claimed, the circuit court rightly ruled that the action could not be maintained. *Pleasants vs. Fant*, 22 Wall. 116; *Thompson vs. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689.

Judgment affirmed.

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

NOTE: See Mechem's Elem. of Partn., §§ 66, 67, 68.

## WAVERLY NATIONAL BANK vs. HALL.

*Supreme Court of Pennsylvania, 1892.*

159 Pa. 466, 30 Am. St. Rep. 823, 24 Atl. Rep. 665.

**ASSUMPSIT** by the First National Bank of Waverly against Charles L. Crandall, Stephen C. Hall, and George F. Lyon, copartners doing business as Hall & Lyon, William L. Watrous and J. B. Floyd, all late copartners doing business as C. M. Crandall. Defendants obtained judgment. Plaintiff appeals.

*Rodney A. Mercur* and *Edward Overton*, for appellant.

*D'A. Overton* and *John C. Ingham*, for appellees.

**HEYDRICK, J.** The plaintiff sues upon notes made by C. M. Crandall, one of the defendants, in his own name, and seeks to charge the other defendants as partners of Crandall in a business in which the proceeds of certain other notes, of which these were renewals, were used. The evidence relied upon to establish the alleged partnership is a contract in writing between Crandall of the one part and the other defendants of the other part, dated February 24, 1885. If this contract does not create a partnership as to creditors, it cannot be successfully contended that all the evidence in the cause, taken together, tends to charge anybody but Crandall; and, inasmuch as all the assignments of error are predicated upon the assumption that such partnership was created by that contract, it is evident that, if that assumption was unfounded, the plaintiffs could not have been injured by the rulings complained of; and hence, though there may have been technical error therein, the judgment ought not to be disturbed. It is therefore pertinent to inquire what were the rights and liabilities of the parties under that contract, although the question is not directly raised by any of the assignments of error.

The whole scope of the contract indicates that a loan of money to Crandall by the other parties in consideration of a share of the profits of a business in which he was to embark was intended, and not a contribution to the capital of a part-

nership of which the parties were to be the members. The parties of the second part covenanted to furnish $3,000 to Crandall, and not to a firm. They were to furnish it to him from time to time, as he might require it, and its payment to them was to be secured by a chattel mortgage upon the tools, machinery, furniture, and fixtures of every kind and nature belonging to or connected with the business in which it was to be used. Crandall might repay it, at his option, before the expiration of the full term for which he had the right to demand it; and, although it was stipulated that the money so to be furnished should be used in the business contemplated, the right of entire control of that business was recognized to be in, and was expressly conceded to, Crandall. And it was further stipulated that nothing in the writing contained should be construed to create a partnership between the parties thereto except as to the profits of the business. These provisions are all consistent with the relation of borrower and lender, and some of them are inconsistent with any other relation. It is, therefore, manifest that that relation was intended to be established; and the next question is whether, in spite of the intention of the parties, the community of interest in the profits constituted them a partnership as to creditors. If this were a Pennsylvania contract, the question would be answered in the negative by the act of April 6, 1870, (P. L. 56), and by *Hart vs. Kelley*, 83 Pa. St. 286. But, although it was made in this State, it was to be executed in the state of New York. Such cases are stated by approved text writers to be an exception to the general rule that the *lex loci* applies in respect to the nature, obligation, and construction of contracts. That exception is thus stated by Judge STORY: "But where the contract is either expressly or tacitly to be performed in any other place, the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." Confl. Laws, § 280. Chancellor KENT, after stating the exception in substantially the same terms, adds that it "is more embarrassed than any other branch of the subject [the *lex loci*] by distinctions and jarring decisions." 2 Comm. 459. But, whatever conflict of authority there may be in respect to the exception, all agree that matters connected with the performance of a contract are regulated by

the law prevailing at the place of performance. *Brown vs. Railroad Co.*, 33 Pa. St. 316; *Scudder vs. Bank*, 91 U. S. 406. Under the present contract it is clear there could be no liability to third persons without a performance as between the parties to it, and therefore the question of such liability would necessarily be connected with or grow out of such performance, and be determinable by the law of New York.

More than a century ago Chief Justice DEGREY, in *Grace vs. Smith*, 2 Wm. Bl. 998, *ante*, laid down the proposition that "every man that has a share of the profits of a trade ought also to bear his share of the loss." In a few years the principle thus stated became recognized as a part of the law of England, and so continued until 1860, when it was overthrown by the house of lords in *Cox vs. Hickman*, 8 H. L. Cas. 268, *ante*. On this side of the Atlantic, and especially in the state of New York, it was accepted without question, so far as I have observed, as to the soundness of the reasons put forth in support of it, until it was exploded in England. As early as 1819, SPENCER, J., delivering the opinion of the court in *Walden vs. Sherburne*, 15 Johns. 409, said: "No principle is better established than that every person is deemed to be in partnership if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade." And, although the judgment of the house of lords in *Cox vs. Hickman* was soon followed by many American courts, the New York court of appeals declared as late as 1874, in *Leggett vs. Hyde*, 58 N. Y. 272, 17 Am. Rep. 244, that the rule remained in that state as it had long been. But, while the judgment of the court sustained the rule, the opinion of the learned judge who pronounced it betrayed dissatisfaction with it, and attempted to depend it on no other principle than that of *stare decisis*, and the chief justice dissented from the judgment itself. The question came before the court of appeals again in *Richardson vs. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267. In that case the defendant had entered into a contract in writing with a firm engaged in the business of manufacturing wagons, by the terms of which they were to manufacture and deliver wagons to him, and use their best effort to sell them. He was to advance $50 on each wagon, to be paid on the first day of each month, and at the time of each advance the firm was to render him an

account of sales of wagons during the previous month, and pay him one quarter of the net profits thereon, with interest on the advances. This instrument was construed to be a contract for the loan of money, and not to constitute a partnership. This was followed by *Curry vs. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343, in which it appeared that certain persons having purchased vacant ground in the city of New York, and being about to erect buildings thereon, entered into a written contract with Fowler, by the terms of which he was to advance $50,000 towards the purchase and erection of the buildings, in consideration of which they "agreed to share the profits of the said purchase and buildings with the said Fowler;" and he was to be allowed interest on his advances, and be secured by bond and mortgage on the premises. This contract was held not to create any other relation than that of borrower and lender; the same judge who delivered the opinion of the court in the case last cited saying: "In *Richardson vs. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267, it was held by this court that a person who has no interest in the business of a firm, or in the capital invested, save that he is to receive a share of the profits as a compensation for services, or for money loaned for the benefit of the business, is not a partner, and cannot be held liable as such by a creditor of the firm." This language was repeated with approval in *Cassidy vs. Hall*, 97 N. Y. 159. It is said, however, in *Hackett vs. Stanley*, 115 N. Y. 625, 22 N. E. Rep. 745, that these cases, and others in harmony with them, do not overrule *Leggett vs. Hyde* and its predecessors. But, while this is affirmed, it is said in the same case that "exceptions to the rule [that participation in profits of a business renders the participant liable to creditors] are, however, found in cases where a share in profits is contracted to be paid as a measure of compensation to employés for services rendered in the business, or for the use of moneys loaned in aid of the enterprise." It is not material to inquire how much more of the rule is left by this exception than was left by *Cox vs. Hickman*. It is enough that the present case comes within the letter and the spirit of the exception. The parties who made the loan, and who are now sought to be held liable as partners, had no voice or part in the prosecution of the business, either as principals or otherwise; nor had they an irrevocable right to demand a share of the profits, as was the case in *Hackett vs.*

*Stanley*. The right of control, or any voice in the control,—an incident of proprietorship,—was denied to them. And the implication of partnership from community of interest in the profits was excluded by an express stipulation, the absence of which in *Hackett vs. Stanley* was thought to be worthy of notice; and their right to demand a share of the profits was to terminate upon repayment of the money advanced at the end of five years, or sooner, at the option of Crandall. In all its material provisions the contract under consideration is not distinguishable from that in *Curry vs. Fowler*, or from those provisions of the contract in *Hackett vs. Stanley*, which it is there conceded would create no other relation than that of borrower and lender. For these reasons the defendants as to whom issue was joined are not liable to the plaintiff, and therefore the judgment must be affirmed.

NOTE: See also cases cited in notes to § 50, Mechem's Elem. of Partn.

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## SPAULDING vs. STUBBINGS.

*Supreme Court of Wisconsin, 1893.*

86 Wis. 255, 39 Am. St. Rep. 888, 56 N. W. Rep. 469.

On August 8, 1888, Wilson H. Stubbings, who lived at Evanston, Ill., but had a store at Marenisco, Mich., entered into a contract with one John O'Connor, who was engaged in business at Eagle River, Wis., by which Stubbings was to advance money to O'Connor for use in his business. O'Connor was to give security for the money, pay Stubbings 10 per cent interest upon it, and also give him one-half of the profits. Stubbings supplied money under the contract, and also turned in the stock of goods at Marenisco. On April 10, 1889, the goods and money so advanced amounted to $14,611.50, and on that day a new contract was entered into between the parties on substantially the same terms as the former. O'Connor carried on the business in his own name until his death in July, 1889, when his son and administrator, George O'Connor, took charge of it. Stubbings knew of and assented to this and continued

to advance money for the business. Plaintiff sold goods to John O'Connor and to George O'Connor for use in the business. George gave a note for part of these goods. The action was upon the note and the account, and was brought against George O'Connor and Stubbings, on the ground that the latter was a partner.

Plaintiff recovered below and Stubbings appealed.

Other facts appear in the opinion.

*Alban & Barnes* (*Gabe Bouck*, of counsel), for appellant.

*Levi J. Billings* (*Miller & McCormick*, of counsel for respondent.

LYON, C. J. (after stating the facts). If defendant Stubbings is liable in this action, he is so liable because he was a partner with John O'Connor, during his lifetime, in the Eagle River business, and allowed the business to be continued on the same basis by the administrators of John O'Connor's estate after his death. We have no case here for the application of the doctrine of estoppel against Stubbings, because he held himself out to plaintiff as a partner in the business. The plaintiff testified he was told by John O'Connor, just before his death, that Stubbings had an interest in the business, and that was all. If plaintiff was a competent witness to give his testimony (which counsel for Stubbings deny), it fails to prove that Stubbings held himself out to plaintiff as a partner with O'Connor in the Eagle River business. It does not appear that plaintiff took the trouble to inquire of Stubbings or any other person what that interest was, if it existed, or to ascertain whether the business was continued on the same basis after the death of John O'Connor; and there is no satisfactory proof that plaintiff relied upon the fact that Stubbings was a partner in the business when he gave credit to John O'Connor, and, after his death, to his administrators. Hence, the first and principal question is, were John O'Connor and Stubbings partners *inter se* in the Eagle River business before and at the time of the death of John O'Connor? Among the numerous definitions of a "partnership" to be found in the treatises on that subject, many of which definitions are collected in 1 Lindl. Partn. p. 2, and in 17 Amer. & Eng. Enc. Law, 828, we think the definition formulated by Mr. Bates in his late work on

that subject is as accurate and satisfactory as any we have seen. This definition seems to be preferred by the learned writer of the article entitled "Partnership" in such encyclopedia. It is as follows: "A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit." 1 Bates, Partn. § 1. It is said by Mr. Lindley that "'partnership,' although often called a 'contract,' is in truth the result of a contract; the relations which subsist between persons who have agreed to share the profits of some business, rather than the agreement to share such profits." 1 Lindl. Partn. p. 2. Hence it is not essential to the existence of a partnership that it be so denominated in the contract of the parties; nor is it necessarily fatal thereto if the parties declare in such contract that they do not intend to become partners. The real inquiry always is, have the parties by their contract combined their property, labor, or skill in an enterprise or business, as principals, for the purpose of joint profit? If they have done so, they are partners in that business or enterprise, no matter how earnestly they may protest they are not, or how distant the formation of a partnership was from their minds. The terms of their contract given, the law steps in, and declares what their relations are to the enterprise or business and to each other.

The learned counsel for Stubbings contends that only the agreement of April 10, 1889, can be considered in determining the question of partnership. This alone of the two agreements above mentioned is set out and relied upon in the complaint to establish a partnership between Stubbings and John O'Connor. While we think the same effect should be given to both contracts, construed together, that should be given to the contract of April 10, 1889, excluding the other, we are willing to adopt the view of counsel, and confine ourselves to giving construction to the latest contract. That instrument in form fixes the amount of money loaned by Stubbings to John O'Connor at the sum of $14,611.50, and binds the latter to repay it in five years, with 10 per cent interest, payable annually. The instrument recites that O'Connor is engaged in carrying on a general merchandise business in Eagle River, and provides that he shall pay Stubbings one-half of the net profits of such business; that O'Connor shall keep correct account books of

the business, which shall be open at all times to the inspection of Stubbings or his agent; and that during five years the stock of goods in the business shall not be sold in bulk without the consent of both parties thereto. It will be observed that this agreement does not specify what O'Connor had done or should do with the $14,611.50, nor the consideration for the stipulation to give Stubbings one-half of the net profits of the business. Such share of the profits could not have been given as additional interest, because the agreement provided for paying him the highest legal rate of interest in this State, independently of the profits. Neither was it for services in the business, for Stubbings did not stipulate to perform services therein. The conclusion is almost irresistible that it was inserted to fix the proportionate share of Stubbings in the business. It will also be observed that in the contract of April 10, Stubbings did not agree to make any further loans or advances to O'Connor, neither does it contain any provision that O'Connor should be responsible therefor should any further advances be made. Stubbings made further advances, however, for the benefit of the business, and it does not appear that any time was fixed for repayment thereof, or that he demanded any voucher or security therefor. It is not reasonable to believe that he would thus have parted with his money if he was not interested with O'Connor in the business, as a principal. Moreover, the letters of Stubbings in evidence show that the proposition to start the business at Eagle River was first made by him; that he purchased much stock for the store; that he advised, if he did not dictate, of whom O'Connor should make purchases, as well as prices and terms; that he arranged for credits; and that he carefully watched and freely interfered with all the details of the business, so far as he could obtain knowledge of those details by persistent requests to the O'Connors to furnish him detailed information thereof. In short, he exercised an influence in, and assumed a control over, the management of the business, (which was acquiesced in by the O'Connors) entirely incompatible with the idea that he was merely a creditor of O'Connor for the amount of his advances and interest thereon, which can only be satisfactorily accounted for on the theory that he was handling and directing his own business. The foregoing considerations impel our

minds to the conclusion that, under the contract of April 10, Stubbings and John O'Connor combined their property, labor, and skill in the Eagle River business as principals, and of course they did so for their joint profit, for the contract gives each one-half the net profits. This makes them partners in the business, within the rule above stated. The contract is strikingly like that under consideration in *Rosenfield vs. Haight*, 53 Wis. 260, 40 Am. Rep. 770, which this court held created a partnership relation between the parties to it. The fact that the business was conducted in the name of John O'Connor, and, after his death, in the name of the administrator of his estate, and the further fact that in Stubbings' letters to each of them the business was usually referred to as "your business," are not significant, for it appears that, for reasons satisfactory to himself, Stubbings desired that his connection with the business should be kept secret. The finding that the business was continued after the death of John O'Connor in the name of his administrators, or one of them, with full knowledge and permission of Stubbings, and was conducted in all respects as before, without any notice to the contrary or adjustment of the partnership business, and that Stubbings continued to make advances to carry it on, are fully sustained by the proofs. It requires no argument to show that in such case the liability of Stubbings as a partner is continued.

The findings of the court are criticised because they ignore the note sued upon, and go upon the open account of plaintiff alone. The note was given for a part of such account, but it is not a payment thereof. The note was brought into court, and the defendants are not prejudiced because the findings and judgment rest upon the original account rather than upon the note. A computation shows that no interest was allowed on the account; hence the judgment is more favorable to defendants than it would have been had it been upon the note. The judgment of the circuit court must be affirmed.

NOTE: See also cases cited, Mechem's Elem. of Partn., §§ 48, 50, notes.

## MAGOVERN vs. ROBERTSON.

*Court of Appeals of New York, 1889.*

116 N. Y. 61, 22 N. E. Rep. 398, 5 L. R. A. 589.

This is an action for goods sold and delivered, brought by John P. Magovern and others against Monroe Mattison and others. On the report of a referee, judgment was entered dismissing the complaint on the merits, which judgment was affirmed by the general term. The plaintiffs appeal. The facts are as follows: On April 30, 1881, the defendants entered into the following contract: "Memoranda of an agreement made and entered into this 30th day of April, 1881, by and between Evolin B. Robertson, of the village of Mayville, Chautauqua county, N. Y., of the first part, and M. Mattison, W. B. Martin, C. H. Johnson, Oren Stoddard, James Moon, W. Holt, A. C. Packard, R. D. Bush, H. D. Stoddard, W. Northrop, Jr., D. H. Matthews, John Northrop, A. M. Rinehart, Jackson & Hollenbeck, W. H. White, A. W. Smith, Mark Jones, J. H. Wood, J. W. Broadhead, of the town of Busti, said county, of the second part, witnesseth, that for and in consideration of the covenants hereinafter expressed the said party of the first part hereby covenants and agrees to and with the said parties of the second part to put a stock of dry goods, groceries, hats, caps, boots and shoes, etc., in what is known as the 'John R. Robertson Store Building,' situated in Busti village, said stock to be at least of the value of three thousand dollars, to be replenished from time to time as it runs below that amount; the said party of the first part to procure the services of John R. Robertson to manage said store, and devote his time thereto, to the interests of the business. The parties of the second part agree to indorse the paper of the said party of the first part to the amount of $2,000, which sum is to go into the business, and the said parties of the second part are to have an interest at all times in the goods in said store to the amount of their indorsement; subject, however, to no liability except such indorsement. At the end of one year the party of the first part is to cause an invoice of the goods on hand to be taken in the presence, if so required, of two of the parties of the second

part; and the net profits of said business, including all commissions received for buying hides, butter, cheese, wool, and other produce, received by said manager, and after deducting insurance on goods, fuel, lights, additional clerk hire, freights, and other necessary expenses of the business, to be divided as follows: Two-thirds of said net profits to belong to the party of the first part, in consideration of her capital and management of said business through said J. R. Robertson, and the use of said store building; and the other one-third of said net profits are to be paid to the said parties of the second part *pro rata*, in consideration of their said indorsement and their general interest in the business. It is further stipulated by and between the said parties that at any time previous to the expiration of said year, when a majority of the parties of the second part shall make a request in writing to that effect, the party of the first part shall cause an invoice of the stock of goods on hand to be taken in the presence of two of the parties of the second part; and if it be ascertained that the business is sustaining any considerable loss, and the said parties of the second part so demand, the party of the first part shall turn over sufficient amount of said goods to secure said parties of the second part against any liability on account of said indorsement, or relieve said parties of the second part from said indorsement, by causing said indorsed paper to be canceled. And it is further agreed by and between the parties that if, at the end of one year, it be ascertained that there has been a profit in said business, and the party of the first part so require, the provisions of this agreement shall extend another year; but if the party of the first part desires to continue said business without the aid of said indorsement, then this contract from and after that date becomes abrogated. Said parties to this contract are to do what they reasonably can to make said business a success. In witness whereof we have hereunto set our hands and seals this 29th day of April, 1881." Pursuant to this contract, on the 7th day of May, 1881, Evolin B. Robertson made her promissory note for $2,000, payable to the order of J. R. Robertson at the First National Bank of Jamestown, which was indorsed by all of the defendants except David H. Matthews. This note was discounted by said bank, and the avails thereof credited to the "Busti Union Store." The note was twice renewed, the

renewals being indorsed by most of the defendants. Between May 7, 1881, and December 16, 1881, the business established by the contract was carried on under the name of the "Busti Union Store," at the place and under the management as stipulated in the contract. From time to time, goods were purchased with the avails of the discounts, and upon credit. During this time, the plaintiffs, who were merchants doing business in the city of New York, sold upon credit and delivered to the Busti Union Store goods of the value and at the agreed price of $1,217.62, to recover which this action was brought against the signers of the contract.

*William H. Henderson*, for appellants.

*A. C. Pickard*, for respondents.

FOLLETT, C. J. (after stating the facts.) Persons having a proprietary interest in a business and in its profits are liable, as partners, to creditors. *Manufacturing Co. vs Sears*, 45 N. Y. 797; *Leggett vs. Hyde*, 58 N. Y. 272, 278; *Mason vs. Partridge*, 4 Hun, 621, affirmed, 66 N. Y. 633; *Burnett vs. Snyder*, 81 N. Y. 550, 555; *Bank vs. Hennessy*, 48 N. Y. 545; *Berthold v. Goldsmith*, 24 How. 536, 541; *Haas vs. Root*, 16 Hun, 526, 26 Hun, 632; *Rosenfield vs. Haight*, 53 Wis. 260, 10 N. W. Rep. 378. It is stipulated in the contract that the parties thereto should do what they reasonably could to make the business a success; that the defendants should have an interest in the goods in the store equal to the amount of their indorsement; and that at the end of the year an inventory should be taken in the presence of two of the defendants, the net profits ascertained, and one-third of them paid to the defendants, "in consideration of their said indorsement and their general interest in the business." Every one of the signers had a right to require that the assets of the business should be applied in payment (1) of the debts of the business; (2) of the sums contributed by each; (3) of the sum due each for profits earned. An execution creditor of Mrs. Robertson (the debt not having been contracted in the business) could not, by a levy upon the goods, have acquired a lien prior to the equitable lien of the defendants to have had them applied in payment of the debts of the business, and of the amount put into the business directly, or by way of their indorsements. Such being the rights of the parties to the contract, they had a proprietary interest in the business and in its

profits, and are liable for the amount due the plaintiffs. The cases holding that a person entitled to a share of the profits of a business in payment for services rendered, or as a compensation for money advanced cannot be charged as a partner, are not in point. The distinction between the rights and liabilities of persons so situated, and the rights and liabilities of persons having a proprietary interest in the assets and profits of a business, has been clearly drawn by the cases decided in the courts of this state. The case at bar cannot be distinguished, in principle, from *Mason vs. Partridge, supra.*

The stipulation in the contract that the defendants should not be liable beyond their indorsements limits their liability as between them and Mrs. Robertson; but, under the findings, it does not exempt the defendants from liability for the plaintiff's claim. It is quite apparent that the defendants knew that the business which they initiated was conducted under the name of the "Busti Union Store," and not under the name and on the credit of Mrs. Robertson. The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

NOTE: See also cases cited in notes to Mechem's Elem. of Partn., § 50.

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## BURNETT vs. SNYDER.

*Court of Appeals of New York, 1880.*

81 N. Y. 550, 37 Am. Rep. 527.

This action was brought against Snyder as partner in the firm of Strang, Platt & Co., to recover an indebtedness due plaintiff from that firm. The principal question involved was whether Snyder was liable as a partner.

Strang, Platt, Ryley, Sexton and Snyder being mutually desirous that Sexton and Snyder should be interested as partners in a firm to be formed, to be called Strang, Platt & Co., and thinking that it was desirable that Sexton and Snyder should not be known as partners, agreed that articles of partnership should be executed by Strang, Platt and Ryley in which they alone were named as partners, Strang to have one-fifth, Platt

two-fifths, and Ryley two-fifths, and that separate agreements be entered into between Sexton and Platt and Snyder and Ryley respectively, by which Sexton should have one-half of Platt's interest and Snyder should have one-half of Ryley's interest.

In 1864 Sexton's interest ceased and a new agreement was entered into by Strang, Platt, Ryley and Snyder to continue the business, Strang to have one-fourth, Platt one-fourth, and Ryley one-half of the profits, and that Synder should have one-half of Ryley's portion.

Ryley died in June, 1867. Strang, Platt, Snyder and the personal representatives of Ryley continued the business until Dec. 31, 1869. A new firm was then formed consisting nominally of Strang and Platt, in which Snyder had an interest in the shares of both. This firm was dissolved by the death of Platt the following April, and a new firm under the old name was then formed in which Snyder continued to have an interest of the same character as before.

The plaintiff had judgment below.

*William G. Wilson*, for appellant.

*Aaron Pennington Whitehead*, for respondent.

ANDREWS, J. The case of *Burnett vs. Snyder*, 76 N. Y. 344, was an action brought to recover a debt owing by the firm of Strang, Platt & Co., to the plaintiff, and Snyder was made a defendant upon the allegation that he was a copartner with the other defendants in that firm. In that case the plaintiff, to sustain the averment that Snyder was a partner, relied upon a written agreement, made December 31, 1869, between Snyder and Peter O. Strang and Ammon Platt, two of the members of the firm of Strang, Platt & Co., executed concurrently with the creation of the partnership, which recited that it was deemed expedient that Snyder should have an interest in and become a copartner in the firm, and which contained a stipulation that Snyder should be entitled to receive one-third of the profits earned and received by Peter O. Strang and Ammon Platt from their interest in the firm of Strang, Platt & Co., and become liable for and pay to them an amount equal to one-third of any losses they, or either of them, might sustain by reason of their connection as copartners, or otherwise with the firm of Strang, Platt & Co. It was claimed on the part of the plaintiff that

Snyder was a partner by the express terms of the agreement, and also, that if as between himself and the other members of the firm of Strang, Platt & Co., he was not a partner, he was a partner to creditors by reason of a right under his agreement to a participation in the profits. The court decided against the plaintiff upon both propositions, and held that an agreement between one of several members of a firm and a third person, that the latter should be a copartner in the firm did not in law make him a copartner, and that an agreement between one member of a firm and a third person that the latter should be entitled to a share of the profits received by the firm, and pay an equivalent share of his losses, was not such a participation in the profits as to constitute the person receiving such share a partner as to third persons, or make him liable for the firm debts.

This action is one of a series of actions commenced by the plaintiff against the successive firms of Strang, Platt & Co., which firm was first organized in 1863, and reorganized December 31, 1869, and again in May, 1870, to recover debts contracted by the several firms to the plaintiff. The debt sought to be recovered in this action was contracted by the original firm, which remained as originally constituted until the reorganization in December, 1869, except that Ryley, one of the original partners, died in 1867, and his interest was continued by his administrators. The case above referred to was brought to recover the debt to the plaintiff contracted by the firm of December, 1869.

The referee in this case found as a fact that the defendant Snyder was a partner in the original firm of Strang, Platt & Co. If this finding is not sustained by the evidence, it becomes the duty of the court to reverse the judgment.

It is not claimed that the judgment can be sustained on any theory of estoppel. Snyder did not hold himself out as a partner. The plaintiff, while the debt for which this action is brought was accruing, was a clerk in the employment of Strang, Platt & Co., but he did not know, nor did he suppose during this time that Snyder was a member of the firm, nor was he informed that he was a partner until 1874, several years after the final dissolution of the firm. His ignorance, of course, is immaterial, if in fact or law Snyder was a partner, but the duty of establishing that relation, in the absence of any holding out by Snyder that he was a partner, is upon the plaintiff

The original firm of Strang, Platt & Co. was constituted by written articles of copartnership between Peter O. Strang, Ammon Platt and George W. Ryley. By this instrument these persons constituted the firm. Snyder was not a party to it, and so far as the written agreement of copartnership indicates, he was not a partner in the concern. The finding that Snyder was a partner is based upon the fact, that concurrently with the formation of the copartnership it was arranged that Snyder should be jointly interested with Ryley in his interest in the firm, that is to say, that Snyder should be entitled to receive one-half of Ryley's profits, and should be liable for one-half of his losses. This arrangement, so far as appears, was not evidenced by any writing executed by the parties. The draft of an agreement was prepared between Ryley and Snyder, conforming to the terms of the oral arrangement, but was not produced, and it does not appear to have been signed. While the negotiation for forming the partnership was going on, Strang, Platt and Ryley expressed a desire that Snyder should become interested in the proposed business. The business contemplated was the wool brokerage and commission business, and Snyder was a large dealer in wool on his own account, and as purchasing agent for mills with which he was connected. It was at first proposed to Snyder that he should become a copartner in the firm. For prudential reasons, growing out of his relations with third parties, Snyder declined the proposition to become a partner. His refusal to become a partner had no connection with the question of the liability which he would incur to creditors by becoming a partner. It was then proposed that he should take a share of Ryley's interest, and the arrangement was concluded on that basis. The evidence shows that the agreement finally made, so far as Snyder was concerned, was an agreement between him and Ryley, made with the knowledge and concurrence of Strang and Platt, the other members of the firm, and in this respect the case differs from the former one. The business of the firm did not require the contribution of capital and none was contributed by any of the partners. Snyder aided the firm by purchases and consignments of wool, but, so far as appears, took no part in the management of the business. The question arises upon these facts, whether Snyder was a partner in the firm, or if not a partner as between himself and the other persons interested, was he such as to creditors.

In *Grace vs. Smith*, 2 W. Bl. 998, and *Waugh vs. Carver*, 2 H. Bl. 235, the doctrine was declared, and was deemed to be settled by these cases, that a participation in the profits of a trade made one liable as a partner to third persons by operation of law, although he was not ostensibly a partner, and although the partnership relation was excluded by the terms of the agreement between him and his associates. This doctrine was followed in England, and was regarded as the true test of partnership as to third persons until the case of *Cox vs. Hickman*, 8 H. of L. Cas. 301, in which the doctrine was strongly impugned if not wholly overthrown. It was held in that case that partnership was a branch of the law of principal and agent, and that persons who shared the profits of a business do not incur the liabilities of partners unless the business is carried on by them personally, or by others as their real or ostensible agents. The defendants in that case, who were creditors of an insolvent firm carrying on business as the Stanton Iron Works, became parties to a deed of assignments executed by them, and by their debtors, whereby the latter conveyed their property to trustees in trust to carry on the business theretofore carried on by the debtors in the name of the Stanton Iron Company, with power to the trustees to enter into contracts relating to the business, and to divide the net income among the creditors in ratable proportions, and it was held that the creditors who executed the deed were not partners in the business, and were not liable on bills of exchange accepted by one of the trustees in the name of the company for iron ore purchased and used by them in the business. But we have in this state adhered to the general doctrine established by the earlier English cases, and although it proceeds upon reasons which have not been considered entirely satisfactory, it was applied by this court in the recent case of *Leggett vs. Hyde*, 58 N. Y. 272; s. c., 17 Am. Rep. 244. But the participation in the profits of a trade which makes a person a partner as to third persons is a participation in the profits as such under circumstances which give him a proprietary interest in the profits before division as principal trader, *Ex parte*, Hamper, 17 Ves. 404; Story on Part., sec. 49; Pars. on Part. 74, and the right to an account as partner, and a lien on the partnership assets in preference to individual creditors of the partner. *Champion vs. Bostwick*, 18 Wend. 175, 3 Kent Com. 25; 1 Smith Lead. Cas. 984. It is not every participation in the

profits which will make one a partner. Numerous exceptions to the rule have been established. See *Vanderburgh vs. Hull*, 20 Wend. 70; *Burckle vs. Eckhart*, 3 Comst. 132; *Richardson vs. Hughitt*, 76 N. Y. 55; s. c., 32 Am. Rep. 267. The contract of sub-partnership, which is a contract between one of two partners and a third person by which the latter is to share the profits, or the profits and losses of the partner with whom the contract is made, in the firm business, does not constitute such a participation in the profits as will make the person contracting with the partner, a partner in the firm, or liable for the partnership debts. In *Ex parte* Barrow, 2 Rose 252, Lord ELDON said: "I take it to have been long settled that a man may become a partner of A, when A and B are partners, and yet not be a member of that partnership which existed between A and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond that he should be interested so far as to receive a share of the profits of the business, and which share he had a right to draw out of the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." See, also, *Bray vs. Fromont*, 6 Madd. 5; *Killock vs. Greg*, 4 Russ. 285; *Frost vs. Moulton*, 21 Beav. 596; Coll. on Part., sec. 27 (6th ed).

It has been said that the English cases only show, that as between the members of the firm *inter sese*, the party contracting for the profits of one of the parties is not a partner, and Mr. Lindley, referring to the subject, remarks, that before the decision of the house of lords, in *Cox vs. Hickman*, a sub-partner might, perhaps, have been liable to the creditors of the principal firm, by reason of his participation in the profits. Lindley on Part., 55. The doubt expressed by this author was resolved in this court by our former decision.

Applying in this case, to the ostensible agreement made between Snyder and Ryley, the test of partnership adopted in *Grace vs. Smith*, as explained in the subsequent cases, Snyder did not become, by virtue of that agreement, a partner in the firm of Strang, Platt & Co. He had no interest in the profits of the firm as profits, but a right simply to demand of Ryley that he should account to him for one-third of his profits, accompanied with an obligation to pay one-third of his losses. He had no joint proprietorship with the members

of the firm in the profits before division; was not entitled to an account as partner, and had no lien on the partnership assets. Tested by the rule in *Cox vs. Hickman*, Snyder's position is still stronger. Strang, Platt & Co. were not his agents for carrying on the business of the firm, and he had no power or right to interfere in its management.

It is claimed that whatever was the form of the arrangement, the intention was that Snyder should be interested as a partner in the firm, and we are referred to the principle that courts will look to the substance and not merely to the form of a transaction to determine its real character. But form may be substance. It is undisputed that Snyder refused to become a partner in the firm. The substituted arrangement was one which the law permitted him to make without involving him in the consequences, or subjecting him to the responsibilities which flow from a partnership. If the ostensible agreement was not the real one, and the secret agreement was that he was to be a partner, clothed with a partner's rights, he could not escape from the responsibilities of that relation, by showing the ostensible contract. The law would not countenance the evasion, or permit him, under cover of the written agreement, to escape from liability as a general partner. But there is no evidence to show, or from which it can be inferred, that the ostensible agreement was not the real one. It may very well be, that the objection which would naturally exist on the part of the parties for whom Snyder was acting as purchasing agent, to his becoming a partner in a concern from which purchases might be made, would apply to the arrangement actually made, but no question arises here between Snyder and his principals. The motive which induced Snyder, by indirection, to become interested in the business of Strang, Platt & Co., so long as the arrangement made did not operate as a fraud upon the creditors of the firm, is not a material circumstance.

The only point here is, whether the actual transaction made Snyder, in law, a member of the firm or liable for its debts. We think it did not, and the judgment should be reversed and a new trial granted.

Judgment reversed.

All concur.

NOTE: For other cases bearing upon sub-partnerships, see Mechem's Elem. of Partn., § 30.

## JACOBS vs. SHOREY.

*Supreme Court of New Hampshire, 1868.*

48 N. H. 100, 97 Am. Dec. 586.

Action by Jacobs & Co. against Shorey and one Mathes to recover upon notes given by Shorey for goods bought of Jacobs who, at the time, supposed he was selling to Shorey alone. It was claimed, however, that Shorey and Mathes were partners, and that there was a fraudulent understanding between them that the goods, when obtained, should be disposed of without paying for them. Mathes had written to one Townsend and others a letter recommending Shorey to credit, and this letter was claimed to be a part of the fraudulent design. There was judgment below for plaintiffs.

*Hatch*, for plaintiff.

*Wheeler, Frink & Hackett*, for defendants.

NESMITH, J. To maintain this action it becomes necessary for the plaintiffs to establish the fact that Mathes shared in the profits of the sale of the goods from them to Shorey, or that Mathes and Shorey were partners in that transaction, upon the ground that where goods are obtained for the use of a firm by means of the fraud of one of its members, the other partner, by receiving and participating in the use or sale of the goods, will be held to have adopted the fraudulent act of him who obtained them, and will be placed in the same situation in reference to the rights of the vendors of the goods as if he had directed his partner to procure the property, or had originally concurred with him in the transaction.

In this way partnerships may grow out of transactions or relations in which the word "partnership" has not been uttered. If there be such a joinder or union of interest and action as the law considers as the equivalent of partnership, or as constituting it, it will give to the persons engaged in it all the rights, and lay upon them all the responsibilities, and also give to third parties dealing with them all the remedies which belong to a partnership: Parsons on Partnership, 9; *Hawkins vs. Appleby*, 2 Sand. 421.

In general, conversations, assertions, or admissions, and acts tending to show that parties are partners, and have that

joint interest in the particular business which makes them liable as partners, will often have that effect, although such evidence might be quite insufficient to prove a partnership, as between themselves, when no third persons are interested in the question: Parsons on Part., 122.

Where there is doubt whether a party purchasing goods bought them for himself alone or for the benefit of another as partner, to prove the latter point evidence may be offered of acts and declarations subsequent to the sale and delivery of the property: Hillard on Sales, 82.

So evidence as to the character of the goods purchased, the ability or insolvency of the purchaser at the time, or whether an inordinately large quantity of goods was purchased in proportion to the party's apparent means of payment, or the credit given, or whether forced sales are made at inadequate prices, before the expiration of the credit given, or whether there may have been any secret or fraudulent transfer of the goods, are all open and legitimate subjects of inquiry, as bearing upon the sale, and the probable intent of the parties thereto: *State vs. Johnson*, 33 N. H. 457; Parsons on Part., 128.

Upon the question whether a purchase was fraudulently made by a vendee in anticipation of his insolvency, evidence tending to show that he fraudulently purchased other and similar goods about the same time, by means of similar false pretenses, may be admitted, having the tendency to show the fraudulent intent or conspiracy in the case under consideration. Acts and declarations showing a fraudulent purpose, if connected in point of time, are admissible as throwing light upon the general object of the party, though they do not relate to the property or transaction in question: *Hills vs. Hart*, 18 N. H. 605; *Lee vs. Lamprey*, 43 Id. 15; *Blake vs. White*, 13 Id. 267; *Angier vs. Ash*, 26 Id. 109.

In this case, the main question is, whether the acts of Shorey were within the scope of a general design to share the profits of the enterprise with Mathes, or whether the goods were obtained on his own credit, or for his own private use or purposes, and we think the jury might properly weigh the fact whether the letter of credit to Townsend and others might not have been designed as means in obtaining money from the plaintiff in prosecution of their general fraudulent purposes. The false pretense alluded to in *Lee vs. Lamprey, supra*, was a letter addressed by one of the partners to another, tending

to show fraud and collusion between the parties. Upon the aforesaid legal principles, the facts stated in the case appear to be sufficient, with or without the letter, to show a fraudulent purpose in both Mathes and Shorey in procuring the goods in question, so as to render them liable as partners: *Bradley vs. Obear*, 10 N. H. 477; *Allison vs. Matthew*, 3 Johns. 235. The letter in question may also be properly used as evidence before the jury as an act or declaration of one member of a firm, and properly within the scope of the partnership business, and to charge the firm, whether honestly or dishonestly transacted or said: *Peirce vs. Wood*, 23 N. H. 519; *Webster vs. Stearns*, 44 Id. 502. Such evidence may be received as one of a series of acts, which, all together, indicate a fraudulent design to obtain the goods without paying for them.

(Residue of opinion omitted.)

Plaintiffs took judgment for the amount of their first note.

NOTE: See also Mechem's Elem. of Partn., § 204.

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## FLETCHER vs. PULLEN.

*Court of Appeals of Maryland, 1889.*

70 Md. 205, 16 Atl. Rep. 887, 14 Am. St. Rep. 355.

Appeal from circuit court, Dorchester county.

Argued before MILLER, ROBINSON, IRVING, STONE, BRYAN and MCSHERRY, JJ.

*S. T. Milbourne*, for appellant.

*Daniel M. Henry, Jr.*, for appellee.

MILLER, J. The plaintiffs, who are nurserymen in Milford, Del., sued Bramble & Fletcher, as partners in the same business at Cambridge, in this state, for fruit trees sold and delivered to them in the autumn of 1886. Bramble died before the trial, and Fletcher defended upon the ground that he was not a partner. The exceptions relate mainly to the admissibility of evidence upon the question, not whether Fletcher & Bramble were actually partners *inter sese*, but whether Fletcher had held himself out, or had permitted himself to be held out, as a partner, so as to become responsible to third parties. The

law on this subject, well established by authority, may be stated thus: "The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm, or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was to some extent induced by this belief. It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop bills, signs, or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent; and whether a defendant has so held himself out, or permitted it to be done, is in every case a question of fact, and not of law:" *Thomas vs. Green*, 30 Md. 1; 1 Lindl. Partn. 45; *Thompson vs. Bank*, 111 U. S. 536, 537, 4 Sup. Ct. Rep. 689; 5 Wait, Act. & Def. 113, 114. These general rules apply to the present case.

The evidence shows that there was, in or near Cambridge, a fruit farm and nursery on about 15 acres of Fletcher's land, which Bramble had occupied and managed from the year 1881 to 1887. The plaintiffs then proved that in October and November, 1886, they received several letters, postal cards, telegrams, and circulars from Cambridge, signed, "Fletcher & Bramble," representing them to be partners, and the envelopes in which the letters were enclosed were stamped with the same firm name. These letters contained orders for fruit trees, and the first of them gave a reference to a Mr. Van Horst, formerly of Milford, but then residing in Cambridge. The plaintiffs not knowing the firm, nor by whom the letters were written, wrote to Van Horst and others, inquiring as to its credit and standing, and in reply received information to the effect that Fletcher was entirely responsible, but that Bramble was worth nothing. Upon this information, and receiving no intimation that Fletcher was not a partner, they filled the orders and delivered the trees, relying upon his credit. Each item of this testimony was excepted to as it was offered, upon the ground that these letters, circulars, and envelopes were written and gotten up by Bramble without Fletcher's knowledge or con-

sent. We think, however, they were all admissible, not because the acts and declarations of Bramble would bind Fletcher, as of course they would not, unless he was an actual partner, but for the purpose of showing that the plaintiffs believed, and had good reason to believe, that he was a partner, and that they trusted the supposed firm upon the faith of his responsibility. To prove this was an important link in the plaintiffs' case, and evidence tending to prove it was, in our opinion, admissible.

The plaintiffs then proved that an advertisement signed, "Fletcher & Bramble," calling attention to their nursery, offering their trees for sale, and soliciting from the public continuance of confidence and orders, was published in two weekly newspapers of Cambridge, where Fletcher lived, for three months during the year 1884. In one of these papers there was also a local notice of the advertisement. These were also prepared, inserted, and paid for by Bramble, without Fletcher's knowledge; but it was proved that during the time of their publication he was a subscriber to both papers, and they were regularly sent him. There is also clear proof that he actually knew of them while they were being published, and never inserted in either of the papers any denial of the partnership. From all this it was competent for a jury to infer that he was held out to the public by Bramble as a partner, with his knowledge and assent; and we are of opinion the plaintiffs were entitled to prove this, though they never saw the advertisements, and were not influenced by them in trusting the firm. They had already proved they had so trusted it in good faith, and upon good grounds, and we think they had the right to resort to these antecedent advertisements, and to this proof, for the purpose of showing that Fletcher had been so held out to the public with his knowledge and assent. It was evidence to go to the jury upon that subject, and, if uncontradicted, would have made him a partner, at least as to all third parties who had trusted the firm in good faith upon that supposition. Having knowledge of these advertisements, it was his duty to deny the partnership, if he wished to escape liability. But what was he to do, and how much? We do not say he was under a legal obligation to publish a repudiation of the partnership in the same newspapers, or in any other, though this would seem to be a very obvious and the most efficient mode of proclaiming such denial, and the fact that

he failed so to do was a circumstance to go to the jury. But we take it that the rule upon this subject, stated by a very eminent jurist, is reasonable and just: "If one is held out as a partner, and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled." Pars. Partn. *134. It follows that the court below was right in admitting all the evidence offered by the plaintiffs, and in rejecting the defendant's first prayers. In regard to his second, third, and fourth prayers, all that need be said is that the propositions they contain are all embraced in his fifth prayer, which the court granted with a single modification, to which we see no valid objection.

We come now to the rulings excluding certain evidence offered by the defendant to show and sustain his denial and repudiation of the partnership. His own testimony was to the effect that Bramble was simply his tenant of the land for the term of six years from 1881; that Bramble had a fruit tree nursery on the land, but he himself had nothing to do with it, and never entered into a contract of partnership with Bramble, either written or verbal, in the nursery business, or any other; that he never held himself out as such partner, and never lent his name, or authorized the use of it by Bramble, with reference to this business, or any other, that he never knew of the letters, circulars, and envelopes written and used by Bramble until they were produced in court at the trial; that the advertisements and local notice were inserted without his knowledge or consent, and he never knew anything about them until they appeared in the papers; that he never put himself to the trouble and expense of publishing in these papers, or in any others, a contradiction of the advertisements, but had, on all occasions, to town people and country people, when the subject was mentioned to him, and often when it was not, denied the existence of any partnership, and repudiated the advertisements as unauthorized by him. All this was allowed to go in without objection, but it is to be observed that he admits he knew of the advertisements which clearly and publicly proclaimed the partnership, and never published in any newspaper any denial of it. We have said he was under no legal obligation to make publication, but that it was his duty to do all that a reasonable and honest man should do, under similar circumstances, to manifest his denial. This is

the important question in the case, and it was one solely for the jury to determine. On this issue of fact he was entitled to adduce all the evidence he could, leaving it for the jury to decide whether, upon the whole of it, they thought he had done all that a reasonable and honest man ought to have done. Under this rule, he was entitled to the benefit of any evidence in corroboration of his own testimony which tended to prove the publicity of his denial. Now, in addition to his own general evidence on this subject, he offered to prove, (1) by the editor of one of the papers in which the advertisement and notice appeared, that, when the witness called upon him to pay for the same, he refused to do so, repudiated all partnership with Bramble, declared he had nothing to do with Bramble's business, and would have nothing to do with his bills. (2) By the postmaster of Cambridge, that soon after the publication of the advertisements witness delivered to Fletcher certain mail matter addressed to "Fletcher & Bramble," but he returned it unopened, and refused to accept the same,—telling witness he had nothing to do with Bramble's business, and was no partner of his. (3) That in July, 1885, he and Bramble were sued as partners by the steamboat company before a magistrate in Cambridge, on a bill for freight; that there was a crowd at the trial, and he resisted the suit, and refused to pay the account, on the ground that he had nothing to do with Bramble's business; that the magistrate gave judgment in his favor, and the case was much discussed in the community, especially by the steamboat agent, who made great complaint because the magistrate had decided in his favor.

In our opinion, these items of evidence should have been admitted. It is not for this court to pass upon their weight or effect, no matter how slight or inadequate, as a denial of the partnership publicly proclaimed in the newspapers, we may deem them to be. This is a matter solely for the jury. Our duty is simply to determine the question of their admissibility as evidence, and we think the court erred in rejecting them. We are also of the opinion that the agreement, or "lease," as it is called, between Fletcher and Bramble, for the land upon which the nursery was carried on, should have been admitted. It was part of the defendant's case, to prove that he was not an actual partner with Bramble. This agreement was admissible for that purpose, if he could show that by its true construction it merely created the relation of landlord and tenant between them. The error in rejecting the items

of evidence referred to requires us to reverse the judgment, and award a new trial. But in view of the fact that the court below acting as a jury found for the plaintiff, notwithstanding they had granted the defendant's fifth prayer, in which all his own testimony in denial of the partnership was expressly submitted to the consideration of the judges, we think each party should be required to pay his own costs, both in this court and in the court below.

Judgment reversed, each party to pay his own costs in this court and in the court below, and new trial awarded.

NOTE: See also Mechem's Elem. of Partn., §§ 70, 71, 72, and cases there cited. Compare also with the following case.

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## MORGAN vs. FARREL.

*Supreme Court of Connecticut, 1890.*

58 Conn. 413, 18 Am. St. Rep. 282, 20 Atl. Rep. 614.

Action on two promissory notes. The opinion states the facts.

*C. S. Hamilton*, for appellant.

*J. W. Alling* and *W. H. Williams*, for appellee.

ANDREWS, C. J. On the 1st day of March, 1880, William M. Babbott made and delivered to the firm of Morgan & Herrick, merchants, then doing business in New York, a note for the sum of $1,004.56, expressed to be for value received, and payable in 30 days; and on the 8th day of the same month another note for the sum of $2,205.60, payable in 30 days at the Ansonia National Bank, Ansonia, Conn. These notes were signed by Babbott in the name of "Franklin Farrel & Company," and were delivered to Morgan & Herrick in payment for certain goods sold and delivered by them to Babbott on his order therefor. The plaintiff is now the owner of the notes, and brings this suit to recover their amount. The complaint alleges that at the time the notes bear date Franklin Farrel and the said William M. Babbott were partners in business under the firm name of Franklin Farrel & Co. Farrel alone makes defense. No service of the complaint was made on Babbott. The answer is a general denial. Upon the trial evidence was offered from

which the plaintiff claimed to have proved that Farrel and Babbott were partners as between themselves, or at least that they were partners as to all third persons, or that Farrel was liable as a partner to Morgan & Herrick, for the reason that he had permitted Babbott to hold out that Farrel and himself were partners under such circumstances that he was estopped to deny that he was a partner. Farrel denied that he was a partner in either way. The superior court rendered judgment for the defendant, and the plaintiff has appealed.

An exhaustive definition of partnership is not easy. So far as the facts in the case present the question of partnership, it is sufficiently accurate to say that there is a partnership between two or more persons whenever such a relation exists between them that each is as to all the others, in respect to some business, both principal and agent. If such a relation exists, they are partners; otherwise not. They are partners in that business in respect to which there is this relation, and as to any other business they are not partners. Partnership is but a name for this reciprocal relation. **Story, Partn. § 1**; Lord WENSLEYDALE in *Cox vs. Hickman*, 8 H. L. Cas. 311; *ante; Bullen vs. Sharp*, L. R. 1 C. P. 86; *Holme vs. Hammond* L. R. 7 Exch. 230; *Harvey vs. Childs*, 28 Ohio St. 319; *ante; Eastman vs. Clark*, 53 N. H. 276; 16 Am. Rep. 192; Colly. Partn. §§ 139, 412; ***Stillman vs. Harvey***, 47 Conn. 26. Between the parties themselves this relation of principal and agent cannot exist, except by their voluntary agreement. *Hazard vs. Hazard*, 1 Story 371; Colly. Partn. § 2. In the present case, the finding is as explicit as language can make it that Farrel and Babbott did not intend to become partners. It says: "No paper was ever signed by or between Farrel and Babbott alone. No conversation ever took place in which it was stated in words that Farrel and Babbott were partners, or were to form a partnership. No firm name was ever mentioned. No suggestion that either had used, or could use, the name or the credit of the other. Neither ever understood, intended, or thought that a partnership existed, or should exist." And, in addition to this, there is the express declaration of Babbott to his counsel—apparently after Farrel had written to him that he, Farrel, had stopped all work on the machine—that he did not believe there was any partnership between them. This part of the case is not pressed, and we

need not pursue it. A partnership as to third persons sometimes arises by operation of law even against the intention of the parties; and this happens either because the contract which the parties have entered into in law makes each the principal and agent of the other, or because by a course of dealing they have shown that such was the real relation between them. Such were the cases of *Parker vs. Canfield*, 37 Conn. 250, 9 Am. Rep. 317; and *Bank vs. Hine*, 49 Conn. 236. It is laid down in *Everitt vs. Chapman*, 6 Conn. 347, that, where the terms of the agreement and the facts are all admitted, whether or not a partnership existed is a question of law for the court to decide. The plaintiff claims that from the facts found by the superior court it does appear that Farrel and Babbott were partners *quoad* third persons, notwithstanding their intent not to be partners. The facts from which the partnership is claimed to arise are mainly the exhibits 1, 2, and 3; and of these exhibit 2 is the only one important. All the other facts derive their significance solely from the construction that is to be put on this exhibit.

Exhibit 2 purports to be no more than an agreement between the Cook Ice & Refrigerating Company, party of the first part, and Franklin Farrel and William M. Babbott, party of the second part, by which the party of the first part, being the owner of patents therefor, grants to the party of the second part the exclusive right to manufacture and sell refrigerating machines and apparatus for refrigerating, as described in the patents, throughout the United States for the full term for which the patents were granted. And, in consideration of that grant, the party of the second part undertakes and agrees, with all diligence and dispatch, and without expense or charge to the party of the first part, to manufacture a refrigerating machine under the patents, and for the purpose of aiding and benefiting the business intended in the agreement, to run the machine for at least two months subsequent to its completion. The party of the second part also agrees to use its best endeavors to create a public demand for the machines, and to manufacture machines to supply any *bona fide* order therefor; and agrees to pay to the party of the first part an amount equal to one-half of the gross profits accruing therefrom. There are other provisions in the agreement, but all having reference to the duties and obligations of the parties thereto. That such

a contract as this does not make the parties—that is, the party of the first part and the party of the second part—partners, is settled by abundant authority. It only provides a way in which the party doing the work is to be paid for its services. *Chase vs. Barrett*, 4 Paige 148. The only relation of Farrel and Babbott that appears by this agreement is that of joint contractors to manufacture refrigerating machines for the Cook Company. There is no suggestion in it that either is, or is to be, the agent of the other. It does not attempt to provide in what way Farrel and Babbott, as between themselves, are to carry out their joint undertaking. A community of interest does not make a partnership. *Loomis vs. Marshall*, 12 Conn. 77; 30 Am. Dec. 596; *Porter vs. McClure*, 15 Wend. 187. Thus tenants in common of land are not partners. *Calvert vs. Aldrich*, 99 Mass. 74; 96 Am. Dec. 693. In *Oliver vs. Gray*, 4 Ark. 425, it was holden that two persons, joint owners of a horse, were not partners in respect to a contract for its keeping. *French vs. Styring*, 2 C. B. (N. S.) 357, was a case where two men owned a race horse, which they entered in a race and won a prize. It was held that they were not partners as to that money. In *Hawkins vs. McIntyre*, 45 Vt. 496, the defendant contracted to finish off a church for the sum of $4,500. Afterwards he agreed with the plaintiff that they should work together in doing the job, each working himself, the work of each to offset that of the other, and the expense of materials and of other work to be deducted from the amount, and the balance to be divided between them. It was held that they were not partners. In the case above cited (*Loomis vs. Marshall*, 12 Conn. 77), B was the owner of a satinet factory. A agreed with B to furnish all the wool that should be needed at the factory for two years, which B agreed to manufacture into cloth, the net proceeds of the cloth, after deducting the incidental charges of sale, to be divided, so that A should have 55 per cent and B 45 per cent. It was held that there was not a partnership as to third persons. It probably could be inferred that Farrel and Babbott were to divide between themselves whatever was left, if anything, after paying the Cook Company. But a partnership, even as to third persons, is not constituted by the mere fact that two or more persons participate or are interested in the net proceeds of a business. 1 Lindl. Partn. 24; *Holme vs. Hammond*, L. R. 7 Exch. 230; *Loomis*

*vs. Marshall, supra; Ex parte* Tennant, 6 Ch. Div. 303; *Bullen vs. Sharp*, L. R. 1 C. P. 86.

Mr. Farrel was a manufacturer of machinery, of long and wide experience. He was at the head of a company in Ansonia, in this state, engaged in manufacturing machinery, and employing four or five hundred hands. Work on a refrigerating machine was begun promptly at the factory in Ansonia under the supervision of Mr. Cook, the patentee, and with the aid of one David Smith and of one Greene, but with no success. "The machines broke down, and proved so faulty and imperfect in their nature, and the business in all respects so unsatisfactory, as not to justify or warrant proceeding. Not a dollar's return in any form was ever received from the business or venture." In the language of the finding, it was "only failure after failure." On September 22, 1879, Farrel wrote Babbott that he had stopped all work on the machine until he could see him. Work did stop at Ansonia at that time, and was never resumed. About November 1, 1879, the Cook Company gave Farrel notice to annul the contract with them, as by its terms they had a right to do, which notice Farrel at once communicated to Babbott. Prior to the stopping of the work on the machines, no act had been done by Babbott or by Farrel in which either had assumed to act for or to bind the other. Everything they had done in carrying out their contract with the Cook Company had been done by them jointly. There was no writing, and there was no course of conduct prior to that time from which any one could be led to believe that these three men were partners. It was subsequent to this time that Babbott commenced and continued in New York the series of acts from which the plaintiff claims "that the court erred in not holding, ruling, and deciding that the defendant Farrel was a partner with the said Babbott as to and against third parties, especially as to and against the plaintiff." A person who holds himself out as a partner, or permits others to do so, is liable as such to third persons, who have given credit to the firm upon the faith of his connection with it, or who knew of such holding out. The liability in such cases is predicated upon the doctrine of estoppel, and, in order to charge a person on that ground, it is not enough to show that he was represented by others to be a partner, or that his name appeared in the firm; it must be shown that he knew that he

was being held out as a partner, and that he assented thereto, or facts from which assent can be fairly implied. *McBride vs. Insurance Co.*, 22 Conn. 259; *Buckingham vs. Burgess*, 3 McLean, 364. It is always a question of fact whether or not there has been such a holding out as to estop a party from denying the partnership. *Wood vs. Duke of Argyll*, 6 Man. & G. 928; *Lake vs. Same*, 6 Q. B. 477. And so the decision of the superior court is conclusive, unless there is some error in its proceedings. Upon an examination of this part of the case, we are satisfied that the result to which the court came was fully required by the facts. In May, 1879, while the parties were at work at Ansonia endeavoring to construct a refrigerating machine, and also were seeking to find or to create a demand for the machines when they should be ready, one F. L. Babbott, a brother of W. M. Babbott, called on a Mr. Blackwell, of Blackwell & Co., warehousemen in Clarkson street, New York, with reference to furnishing them with a machine, and on the 29th day of July following, W. M. Babbott entered into an arrangement with Blackwell & Co., as shown by exhibit 4. It was explained to Blackwell that the machine was to be built by Franklin Farrel, of the Farrel Foundry Company at Ansonia, Conn. At that time there was no machine or apparatus in condition to be set up, and, as none was ever completed, nothing was done under that arrangement. "The first knowledge that Mr. Farrel had that any use was being made of his name or credit in any form was about January 1, 1880, when a three months' note, dated October 22, 1879, signed 'Franklin Farrel & Co.,' payable at Ansonia National Bank, was brought to his attention a few days before it fell due by the cashier, who asked him what he knew about it. Up to that time he had never learned that there was any claim to a partnership with him made by Babbott. He knew nothing of Blackwell except as above stated; never saw him until long after; was never at Clarkson street, and had no knowledge of any business done there. He had no knowledge of any transaction with Morgan & Herrick, and had never heard of that firm until the notes in suit matured, and were demanded and protested. He did not know that Smith was in New York, and could not find or meet Babbott there." Such is the finding, and it is added that he knew nothing of the Delamater Iron Works, or that Babbott had any dealings with it. It appears, then, that the only

fact which the defendant knew was that some one had wrongfully used his name on that note. It does not appear that at the time he knew that Babbott was the man. Inferentially it would seem that he did not know, for it is stated that he could not find Babbott in the city. But without pausing to remark on the dearth of knowledge the defendant had of Babbott's doings, we pass to another feature in this part of the case.

A party setting up an estoppel by conduct is bound to the exercise of good faith and due diligence to know the truth. Bigelow, Estop. 480; *Moore vs. Bowman*, 47 N. H. 499; *Odlin vs. Gove*, 41 N. H. 465. When Babbott began his operations with Morgan & Herrick he showed them a copy of the contract with the Cook Company, and also a letter from Farrel, in which occurred the words, "I have concluded to go on with the business," accompanied with statements that he and Farrel were partners. They were told that the goods were to be used in the manufacture of a refrigerating machine by Franklin Farrel & Co., at Clarkson street, New York city. They seem not to have been satisfied with the terms of that contract, nor with the statements that were made to them; for they made inquiries of the Delamater Iron Works, of which Farrel knew nothing, and of the mercantile agencies of Dun, Barlow & Co., and of Bradstreet & Co. From these agencies they were able to learn nothing as to any firm of Franklin Farrel & Co., who composed it, or as to its responsibility, or that there was any such firm at all. If Babbott and Farrel had been partners, by virtue of the contract with the Cook Company, they had been such since the 22d day of March, 1879. The absence of the name of any such firm from these mercantile agencies was a most significant circumstance. These agencies made known to Morgan & Herrick all about Franklin Farrel and his responsibility. These agencies could tell, and presumably did tell, where Farrel lived, and in what business he was engaged; that he was a man of large means, a large manufacturer of machinery, having a large factory and employing many hands in that kind of work. From this information, Morgan & Herrick would know that the manufacture of a refrigerating machine would be in the exact line of work Farrel was doing at his own factory in Ansonia, Conn. That such a man, having such facilities, was represented to

be carrying on the manufacture of a refrigerating machine in a warehouse in Clarkson street, in the city of New York, and that he was doing it on credit, would be certain to excite inquiry in the mind of any prudent man. Why did not Morgan & Herrick inquire further? Mr. Farrel was a manufacturer in Connecticut, not in the city of New York. In a manufacturing partnership, the place where it was to be carried on would be likely to be a controlling feature. For such work there must be machinery to use, and power to run it, and men to operate it. All these Mr. Farrel had in Connecticut, and none of them in New York. The court had judicial knowledge that Ansonia was easily accessible from New York city by railway; that there was frequent communication by mail, or that the telegraph might have been used, and a reply obtained in half an hour and at trifling expense. 1 Whart. Ev. § 339. When so many circumstances called for inquiry, and with all these means by which inquiries could have been satisfied, and when none of them were used, we cannot hold that the plaintiff's assignors exercised good faith or due diligence to know the truth.

On the trial the plaintiff introduced a large number of letters and postal cards which had passed between Farrel and Babbott, for the purpose of showing that they were partners in the refrigerating business. The defendant claimed that these letters, or some of them, had reference to other matters and not to the refrigerating business, and to show this offered other letters and postals that had passed between them. To these the plaintiff objected; but the court admitted them solely for the purpose named. That letters which had passed between these men might tend to show that they were partners in any business is very obvious, and that other letters on the same or a kindred subject might modify or contradict the first ones is equally obvious. The real relation between the parties could best be shown by the whole correspondence, not by part of it.

There is no error in the judgment appealed from.

The other judges concurred.

NOTE:—Compare *Meriden Nat. Bank vs. Gallaudet*, 120 N. Y. 298, 24 N. E. 994, involving other aspects of the same transactions. See also Mechem's Elem. of Partn., §§ 35, 50, 70, 71, 72.

## HAHLO vs. MAYER, *et al.*

*Supreme Court of Missouri, 1890.*

102 Mo. 93, 13 S. W. R. 804.

Appeal from St. Louis circuit court; George W. Lubke, Judge.

*Hugo Muench* and *Frederick A. Kline*, for appellant.

*Albert Arnstein*, for respondent.

BRACE, J. This is an action against Abraham B. Mayer and Frederick Mayer, as partners under the firm name of A. B. Mayer & Son, on two negotiable promissory notes,—one for $1,500, dated September 4, 1884, the other for $1,000, dated September 6, 1884,—each payable to J. R. Wallach & Bro. six months after date, and signed "A. B. Mayer & Son." Abraham B. Mayer answered under oath, denying the execution of the notes and the alleged partnership. Frederick answered, admitting that he executed the notes, avers that they were executed by him without consideration, for the accommodation of the said J. R. Wallach & Bro., and without the knowledge of his co-defendant, the said Abraham, and denies the alleged partnership between him and the said Abraham. There was a verdict and judgment for the plaintiff for the amount of the notes, interest, damages, and costs, against both defendants, and they appeal.

The evidence tended to prove that the notes were executed by Frederick Mayer, without any consideration, for the accommodation of the payees, J. R. Wallach & Co., and by them negotiated, and that the plaintiff acquired them for value before maturity, and that they were so executed and negotiated without the knowledge of the said Abraham. The main question in the case was, were the said defendants, at the time the notes were executed, partners? and, if not partners in fact, did the said Abraham so hold out the said Frederick as his partner as that he is estopped from denying that he was a partner, in an action upon the negotiable promissory notes executed by the

said Frederick in said firm name, brought by the holder thereof, who acquired the same for value before maturity? Upon the second proposition the court gave the following instructions, (we quote only so much of them as bears upon the proposition:)

"(2) The court instructs the jury that, if they find from the evidence that at the time the notes in controversy were executed, and were received by plaintiff, the business of A. B. Mayer was conducted under the name of A. B. Mayer & Son, and that said A. B. Mayer knew such to be the fact and acquiesced therein, then said A. B. Mayer is liable on the notes in suit even though the jury finds that there was in fact no actual partnership then existing between said A. B. Mayer and his son Frederick.

(3) The court instructs the jury that the presumption of law is that a party to whom a negotiable note is transferred takes it upon the faith of the persons whose names appear upon it as makers. Therefore, if the jury find from the evidence that A. B. Mayer knew that his son, Frederick, was using the name of the firm of A. B. Mayer & Son in the business of said A. B. Mayer, and said A. B. Mayer acquiesced therein, then plaintiff had a right to rely on the signature on said notes as being the signature of A. B. Mayer and of his son, Frederick; and the jury will find against both defendants, even though they find that the defendant Frederick had no express authority to sign the name of 'A. B. MAYER & SON' to the notes."

The name that appeared upon the face of the notes sued upon, as maker, was "A. B. Mayer & Son." The plaintiff took the note upon the faith of that firm. He has a right to look for payment of his note to every individual who was a member of that firm at the time the note was executed. He has the further right to look for payment to every individual who, when he acquired the notes, was holding himself out to him as a member of that firm, whether he was in fact a member of that firm or not. If the instructions had been confined within these limitations, they would have been unobjectionable; but they go further, and declare that the defendant Abraham B. Mayer is liable as a member of the firm of A. B. Mayer & Son, although in point of fact he was not a member of such concern, if, at the time of the execution of the notes sued on, he was holding himself out to the world as a member of the firm of A. B. Mayer & Son, whether the plaintiff knew of such holding out to the pub-

lic or not. While this proposition may be said to have had the sanction of respectable authority, (*Young vs. Axtell*, cited in *Waugh vs. Carver*, 2 H. Bl. 242; *Poillon vs. Secor*, 61 N. Y. 456; *Smith vs. Hill*, 45 Vt. 90; *Rizer vs. James*, 26 Kan. 221,) it has not been able to stand the test of critical judicial inquiry, which has in vain sought for a principle upon which it could stand. The great weight of modern authority is against it. The only conceivable ground upon which one can be charged as a partner by one who contracts for him, and in his name, as a partner, without his authority, and when in fact he was not a partner, is upon the ground of estoppel. The supreme court of the United States in *Thompson vs. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689, considered this question very fully, and, after a thorough review of the authorities, held that a person not in fact a partner could not be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, and approved the following summing up of the law on this subject by Mr. Justice Lindley his treatise on the Law of Partnership:

"That no person can be fixed with liability on the ground that he has been held out as a partner unless two things concur, viz.: *First*, the alleged act must have been done by him or by his consent; and, *secondly*, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and, in the absence of the second, the person seeking to make him liable has not in any way been misled." 1 Lindl. Partn. (2d Amer. Ed.) 43. The court cites many authorities which on examination will be found to sustain this position, to which others might be added if it were necessary. The doctrine thus announced has been expressly recognized and approved in this state in the cases of *Rimel vs. Hayes*, 83 Mo. 200, and in *Hannah vs. Baylor*, 27 Mo. App. 302, while the earlier case of *Dowzelot vs. Rawlings*, 58 Mo. 75, may be said to rest on the same principle. It is maintained by all the recent text-writers on the subject.

In a work just published, reviewing many, and citing nearly all, the leading English and American cases on the subject, it is said liability by holding out "proceeds solely on the ground of estoppel," and "a person being liable as a partner, by hold-

ing out on the ground of estoppel solely, is therefore not liable to one who did not know of such holding out at the time of contracting. The holding out must antedate the contract; and the plaintiff's knowledge of, and reliance on, his alleged connection, must be proved as of that time, for otherwise the plaintiff was not misled." 1 Bates, Partn. c. 5, § 90 et seq. The same doctrine is asserted by another author, whose valuable work has just come to hand, (J. Pars. Partn. 1889, c. 3, § 69,) the correctness of whose position is recognized by Mr. Bigelow, in the last edition of his work on Estoppel, (5th. Ed.) 565, note 1.

He who holds another out to be his partner, holds himself out as a partner of such other person. There was evidence tending to prove that at St. Louis, where the defendant A. B. Mayer was engaged in business for some months previous to the execution and negotiation of these notes, he had been holding out to the public that his son, Frederick, was a partner of his, under the firm name of A. B. Mayer & Son. The notes were negotiated in the city of New York, where the payee, Wallach & Co., for whose accommodation the son executed them, was doing business, and where the plaintiff acquired them. There was no evidence tending to prove that the plaintiff had any knowledge of any act of the defendant Abraham Mayer relied upon to show that he was holding out his son as a partner. The facts of the case presented simply a holding out to the public as a partner; and the court, as a matter of law, declared in the instructions quoted that such holding out to the public was sufficient to render the defendant Abraham Mayer liable, although he was not a partner of his son, and the plaintiff may not have known, or had any reason to believe, that he had ever held out his son to be his partner. In this the court committed error, for which the case must be reversed, and the cause remanded for new trial.

All concur except BARCLAY, J.

NOTE.—See Mechem's Elem. of Partn. §§ 69–78.

## *In re* KRUEGER *et al.*

*U. S. Dist. Ct. 1871.*

2 Lowell 66, 5 N. B. R. 439, Fed. Cas No. 7941.

Petition against Krueger, Loud, & Bailey, alleged to be partners in trade under the firm of Krueger, Loud, & Co., and to have stopped payment of their commercial paper. Krueger defended on the ground that he had left the firm before the note held by the petitioners was given. The firm had carried on the lumber business at Boston for about three years, and in September, 1870, there was a verbal agreement for a dissolution. Krueger retired and sold out his interest to the remaining partners on a credit of four months, with a condition that the sale should be void if the notes were not paid at maturity, which they were not. He took no further part in the business, which, however, was conducted in the old name of Krueger, Loud & Co., with his consent, and the name remained over their place of business. In December, 1870, notice was published, three times each, in two newspapers of Boston, that Krueger had retired, and that Loud & Bailey would continue the business at the same place and under the old name. The petitioners were bankers, who had often discounted the firm notes and other paper signed or indorsed by them; but never by direct negotiation with the firm, or any member thereof, but through a brokor or other third person. This note was given, in the name of Krueger, Loud & Co., in February, 1871, to Badger & Batchelder, in exchange for their note, as had often been done by both the old and new firm. The petitioners had no actual notice of the dissolution, though they always took in at their office one of the newspapers in which the notice was printed. There was conflicting evidence upon the question, whether Badger & Batchelder had such notice. They sold the note to the petitioners for value, before its maturity.

*H. D. Hyde*, for the petitioners.

*C. P. Judd*, for the defendant Krueger.

LOWELL, J. Three points are clear upon the evidence before me: 1. The firm of Krueger, Loud & Co. was dissolved by the retirement of Krueger in September, and this was published in the newspapers in December. 2. The petitioners had no actual notice, and supposed when they took the note that it bound Mr. Krueger. 3. The old firm style, which included the name of Krueger, was retained by his former partners, with his consent The other matter of fact, whether Badger & Batchelder, the payees of the note, had actual notice of the change, was not so fully cleared up as would be desirable, and might have been practicable, if all possible witnesses had been examined. Assuming that the petitioners had never dealt so directly with Krueger, Loud & Co. as to be entitled to actual notice of the dissolution of the partnership, still, if they took this note, relying in part on the credit of Krueger, and he authorized his late partners to use his name in their business, he is responsible as a partner in respect to this note. One of the reported cases decides that the mere authority to use the former partner's name imports an obligation for all debts, even those held by a person who knew of the arrangement: *Brown v. Leonard*, 2 Chitty, R. 120. Another case decides that the retired partner, if his name is retained in the firm, is liable for injuries caused by the negligence of a driver of a dray belonging to the new firm: *Stables v. Eley*, 1 C. & P. 614. These decisions go much beyond anything demanded by this case; but they seem to have received the approval of the text-writers. Thus Chancellor Kent says (3 Com. 5th ed. 68): "When a single partner retires from the firm, the same notice is requisite to protect from continued liability; and even if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, or in the title of the firm over the door of the shop or store, he will still be holden." And in 1 Lindley, Partnership, 45, it is said to be wholly immaterial whether the person holding himself out as a partner does or does not share profits or losses, and even that it is known that he does not share them; because the permission to use his name imports a willingness to be liable for the debts, and to look to the real partners for indemnity. And at page 330 of the same volume, we find: "If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability, on the principle of holding out explained in the earlier part of this treatise."

That one who is not really a partner may be bound as such to third persons, who have been led by his acts or declarations to believe him to occupy that relation, is familiar law, and has been often recognized in Massachusetts. Story, Partnership, Secs. 64,65; *Fitch v. Harrington*, 13 Gray, 468; *Adams Bank v. Rice*, 2 Allen 483, per Bigelow, C. J. In *Goddard v. Pratt*, 16 Pick. 412, it was held that the members of a copartnership which had been dissolved, but permitted the firm name to be used by an incorporated company, were liable upon contracts made by the corporation in the name of the firm with persons who had no knowledge of the dissolution. That case does not find what notice is necessary in order to exonerate the partners; and it may be argued, with some force, that a publication in the newspapers is enough to bind all persons who had not dealt directly with the firm before the notice was published. This is the general rule; but we have seen that the English books, and Chancellor Kent in his Commentaries, make an exception of a case like the present, and hold that the retiring partner remains liable, notwithstanding notice, if his name is still used with his consent. It may possibly be doubted whether an estoppel ought to apply where the creditor has actual notice of the true state of the case; but leaving out actual notice, which is negatived by the evidence here, I believe the true rule to be, that one who suffers his name to be used in a firm must answer to all who rely on that name, whether old customers or not. Here is a note signed Krueger, Loud, & Co., with the defendant's authority. As between the parties, it means only Loud & Bailey; but when third persons take it in good faith, believing that it binds the three persons who are apparently bound by it, they must be bound.

It was held in Massachusetts that one not really a partner could not be made bankrupt as such upon the petition of one of the actual partners: *Hanson v. Paige*, 3 Gray, 239. But I have no doubt that creditors may proceed in bankruptcy, as elsewhere, against all the persons who are held out as partners. See *Re Disideri & Co.*, L. R. 11 Eq. 242; *Re Rowland*, L. R. 1 Ch. 421 (1866).

In accordance with this opinion, the defendant Krueger will be defaulted.

NOTE.—See Mechem's Elements of Partn., § 70.

# V.

# NATURE OF PARTNER'S INTEREST IN PROPERTY.

## BANK vs. CARROLLTON RAILROAD.

*United States Supreme Court, 1870.*

11 Wall. 624, 20 L. Ed. 82.

Bill by the Fourth National Bank of New York against the New Orleans and Carrollton R. R. Co., Beauregard, Hernandez, Binder and Bonneval, to enforce the transfer claimed to have been made to it by one Graham, under the circumstances stated in the opinion. Beauregard had acquired a lease of the railroad, covenanting not to assign or sublet without the consent of the directors. May and Graham signed the lease as sureties for Beauregard. Immediately after obtaining the lease, Beauregard, May and Graham entered into copartnership for its equipment and management. About a year later Graham assigned all his interest in the railroad and the partnership to complainant. Hernandez, Binder and Bonneval claimed under a subsequent assignment from May, and denied that when Graham assigned to complainant he had anything to assign, being, as they claimed, merely a trustee for May.*

The court below dismissed the bill and the Bank appealed.

*P. Phillips*, for the appellant.

*J. A. & D. Campbell*, for defendants.

STRONG, J. The effect of Graham's assignment to the complainant was, undoubtedly, to dissolve the partnership which

*See *Case vs. Beauregard, post*, 946, involving further litigation growing out of the same transactions.

had existed between Beauregard, May and himself, but it did not make his assignee a tenant in common with the other two partners in the property of the firm. It seems to be assumed on behalf of the complainant, that, in succeeding to Graham's rights, the bank acquired an ownership of the effects of the firm jointly with Beauregard and May, and that, as Graham had been an equal partner with them, his assignee, of course, became the owner of one undivided third of the railroad lease and other property of the firm. But this assumption is based upon a misapprehension of the effect of the assignment. It has repeatedly been determined, both in British and American courts, that the property or effects of a partnership belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; consequently that no greater interest can be derived from a voluntary sale of his interest by one partner, or by a sale of it under execution. *West vs. Skip*, 1 Ves. 239; *Nicoll vs. Mumford*, 4 Johns. Ch. 522; *Doner vs. Stauffer*, 1 Pa. 198. In *Field vs. Taylor*, 4 Ves. Jr. 396, it was said that "a party coming into the right of partner" (in any mode, either by purchase from such partner, or as a personal representative or under an execution or commission of bankruptcy), "comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts."

When, therefore, the Bank obtained from Graham the assignment, which is the foundation of its claim in this suit, it obtained thereby no ownership of the lease made by the Railroad Company to Beauregard, and which he agreed to hold for the benefit of the firm, nor did it obtain any aliquot part of it, or of any of the effects of the firm. The utmost extent of its acquisition was an interest in the surplus, if any, which might remain after all the debts of the firm should be paid, and after the liabilities of Graham to his copartners, as such, should be discharged. It was not in the power of Graham, by retiring from the firm in violation of the articles of copartnership, either to introduce another partner or to deprive the partners who remained of their right to have all

the partnership property held for partnership purposes. Incident to the right of the Bank to share in the surplus was a right to enforce a settlement of the partnership accounts in order to ascertain if there was any surplus. It is true the words of the assignment were very broad. It purported to transfer all the estate, right, title and interest in the lease made by the New Orleans and Carrollton Railroad Company to Beauregard, to which the assignor might be entitled by virtue of the articles of copartnership, and also all his right and interest in any property and effects of the partnership, and all debts to him from the partnership or any member thereof. But no matter what its language, it is clear no more could pass under it than the right of the assignor; and if, as we have said, that was not a right to the specific articles of property belonging to the firm, the Bank obtained no such right. We are not now speaking of the fact that, under his contract with the Railroad Company, Beauregard had no right to transfer the lease either to the partnership or to its members. The case does not require us to consider that inability. It is sufficient that the complainant's right was only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, and that this is a bill for such settlement. Manifestly, then, it is incurably defective, because neither Graham nor May are made parties defendant. It is too plain for discussion that to such a bill all the members of the firm are indispensable parties, for they are all directly affected by any decree that can be made.

How utterly impossible it is to ascertain what the equity of the complainant is, with the present state of the record, will appear more distinctly, if the provisions of the articles of copartnership be considered. When it was formed, Beauregard had obtained from the New Orleans and Carrollton Railroad Company a lease of its railroad, with all of its rolling stock and with its corporate privileges, for the term of twenty-five years. Though the sole lessee, and prohibited by his contract from assigning or underletting, it was, nevertheless, agreed between him and his copartners that the lease should be for their common benefit; that May and Graham should each advance $150,000 to carry on the enterprise of running the road, and that Beauregard should take charge of, manage and direct the undertaking for the mutual advantage of the parties,

at a fixed annual salary, selecting and appointing his own assistants. It was agreed that the money advanced, with eight per cent, interest, should be repaid from the annual profits of the enterprise, and that the remainder of the net profits should be equally divided between the partners, and that all losses should be equally borne by them. The contract evidently contemplated that the property of the firm and the management of its affairs should be in the hands of Beauregard. Books were to be kept, showing not only all money received and expended, but also all purchases made on account of the copartnership; and monthly statements of amounts received and expended were required to be furnished by Beauregard to May and Graham. It was also agreed that the partnership should continue twenty-five years from the date of the lease, which was April 12, 1866. Now, it is quite possible that on settlement of the accounts, Graham may be found indebted to the firm, or to his copartners, and that the court would be required thus to decree.

How can such a decree be made when he is no party to the record? Or it might appear that May is a large debtor to the firm. How can any decree be made against him? How can any decree be made that will not prejudice one or the other of these partners? And yet, whether the Bank complainant has any interest or not—whether it acquired anything under Graham's assignment—can be determined only by a final and conclusive settlement of the partnership accounts between all the partners, two of whom are not parties to this suit.

It is argued, however, on behalf of the appellant, that even if May and Graham were necessary parties, the bill should not have been dismissed, but that the complainant should have been allowed to bring in new parties by a supplemental bill. It is, doubtless, the general rule that a bill in chancery will not be dismissed for want of proper parties; but the rule is not universally true. It rests upon the supposition that the fault may be remedied, and the necessary parties supplied. When this is impossible, and whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. Nothing is to be gained by retaining it, when it is certain that the complainant can never be entitled to a decree in his favor. Note 5, sec. 541, Story, Eq. Pl.; *Shields vs. Barrow*, 17 How. 130; [58 U. S. XV,. 158]. In the present case we

have seen that no decree for an account can be made, until all the partners are made parties. But if both May and Graham had been made parties defendant, the circuit court would have had no jurisdiction of the case. It is said Graham might have been made a coplaintiff. Perhaps he might and had application been made in due season for such an amendment of the bill, it might have been the duty of the circuit court to grant it. But no such application was made. The complainants chose to stand upon their case as they presented it. Possibly they never would have sought to bring in the necessary parties. The defendants could not bring them in. New parties cannot be brought into a cause by a cross-bill (*Shields* vs. *Barrow*, *supra*), and had the bill not been dismissed, it must have been left at the option of the complainants whether the case should ever be brought to a final decree.

Under these circumstances, there was no reason for retaining the bill.

It is insisted, however, that the court erred in dismissing the bill, reserving only a right to sue Beauregard, May and Graham, for a settlement of the partnership between them prior to the 14th and 16th of May, 1867. Yet if the right acquired by Graham's assignment was, as the authorities show, not an ownership of the specific effects of the partnership, but only a right to share in the surplus remaining after the settlement of the partnership accounts and the payment of all debts, as well as the just claims of the several partners, it is clear there can be in the complaint no equity against the Railroad Company, or against Hernandez, Binder or Bonneval, who have succeeded to May's rights (not his obligations), if they have not to Graham's. No fraudulent confederacy is charged in the bill. At most, according to the complainant's own showing, they are purchasers of property that belonged to the firm. There was, therefore, not only a want of indispensable parties, a want which cannot be supplied without ousting the jurisdiction of the court, but a misjoinder of the defendants, a misjoinder apparent upon the face of the bill.

Hence the decree of the circuit court was correct.

The decree of the circuit court is affirmed.

NOTE: See Mechem's Elem. of Partn., § 97, *et seq.*

## STAATS vs. BRISTOW.

*Court of Appeals of New York, 1878.*

73 N. Y. 264.

Staats brought this action against Bristow, who was the assignee of Stockbridge & Martin, to establish the title which plaintiff claimed in the property of that firm now in defendant's possession. Plaintiff relied upon his purchase at a sheriff's sale.

Other facts appear in the opinion.

Defendant had judgment below.

*C. H. Bannigan* and *W. W. Niles*, for appellant.

*John E. Parsons*, for respondent.

FOLGER, J. The defendant had the possession of certain personal property, to which the plaintiff claims that he was entitled. It was, of course, incumbent upon the plaintiff to show and establish his title. He showed that he was the purchaser at a sheriff's sale. The certificate given by the sheriff does not say that the plaintiff bought the property itself; it says that he bought, only, all the right, title, and interest which Joseph Stockbridge had in it on the 30th November, 1874. The sheriff's return on the execution upon which he sold is the same. The execution on which the sale took place directed a sale of the property of the defendants therein named, who were the Stockbridge above named, and his copartner, Martin; but the property pointed at was what they owned, or either of them owned, on a day named, to wit: on the 9th December, 1874; and before that day, to wit: on the fourth day of that month, the defendants in the execution had assigned the property to the defendant in this action in trust for all of their creditors.

So it is apparent that the plaintiff did not buy the property itself, specifically; but only the interest, right, and title which Stockbridge had in it. Now the interest which he had in it was that of one of two partners; as the property was part of

the assets of a copartnership firm of which he was a member The interest of a member of such a firm in the assets of it is the share to which he is entitled by the terms of the copartnership, in the surplus of those assets remaining after all partnership debts are fully paid. It appears in this case that the firm was insolvent; that its debts much exceeded its assets; that there never could arise a surplus. So the interest of Stockbridge, as an individual, in this property was nothing; and so the plaintiff got nothing by his purchase.

The force of these views is resisted by the plaintiff thus: It is claimed, and rightly, that one partner may sell and transfer the entirety of any particular personal effects and property of the partnership for purposes within the scope of the business, and can make sale to a creditor of the firm in payment of a debt due, without the knowledge or consent of another partner, though the firm be insolvent and thereby a preference be given to the creditor vendee. Then, it is claimed that the law may do whatever one partner can do. Let it be granted that it may, for this occasion, though we do not concede it as a universal principle. The law has not in this case undertaken to do that. The attachment, under which it is claimed that the first step was taken toward doing that, was not against this property specifically, nor was it against the property of the firm. It was against the property of Stockbridge. What was the property of Stockbridge? It was what he owned in individual right, and it was his interest in the property of his partnership. What that interest was has already been shown. So that the law did not undertake to do, nor has it done, more than to sell for the benefit of a firm creditor the property of Stockbridge. We speak now of what was done by virtue of the attachment alone. The action was against both partners, and both were brought into court. But if both had not been brought into court, and judgment had been got, and execution issued directed to be levied upon the sole property of the one served, and upon the joint property of both, the law would have undertaken to do what we admit one partner can do; and if this joint property had been levied upon before the assignment to defendant, and had been sold to the plaintiffs in the execution, or to one of them, and the avails paid over, the law would have succeeded in doing just what one partner could have done. The law must seek the end desired by the

legal path, just as the single partner must. That path was not by an attachment against the property of one partner who, by his personal situation, was obnoxious to that process. That could issue, but not against joint property; only against individual property; and individual property was only the interest in a surplus.

These views do not conflict with *Van Brunt vs. Applegate*, 44 N. Y. 544, on which the appellant much relies, and we do not express any opinion upon what was there held.

The judgment appealed from should be affirmed.

NOTE: For other cases, see Mechem's Elem. of Partn., §§ 99, 100.

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## SINDELARE vs. WALKER.

*Supreme Court of Illinois, 1891.*

137 Ill. 43, 27 N. E. Rep. 59, 31 Am. St. Rep. 353.

The plaintiff Sindelare and one Hubka had been partners in the dry goods business, and while so they gave a chattel mortgage on their stock to Walker. Sindelare brought this action against Walker and Hubka (though he discontinued as to the latter), charging that by collusion between them there had been a fraudulent foreclosure of the mortgage by Walker and a purchase of the stock by Hubka, and that thereby he, the plaintiff, had been wrongfully deprived of his interest in the goods, profits and good will of the business.

The court below sustained a demurrer to his declaration, and he brought error.

*Jones & Lusk*, for plaintiff.

*Trumbull, Willits, Robbins & Trumbull*, for defendant.

WILKIN, J. (After stating the facts.) There is no averment that the copartnership between plaintiff and Hubka has been dissolved, or any settlement whatever had of their partnership affairs. The declaration, therefore, not only fails to show any individual title or ownership in plaintiff to said property, partnership business, or the profits or good will thereof, which

he says he lost, but affirmatively discloses a state of facts from which it appears that he had only a community of interest therein with his partner, who consented to said transfer and all that was done by defendant. A partner's right to partnership property is an ownership of all the assets of the firm, subject to the ownership of every other copartner, all the partners holding all of the firm assets subject to the payment of the partnership debts and liabilities: Parsons on Partnership, 350. It is clear, therefore, that the individual interest of one partner in the firm property and business can only be ascertained by a settlement of the partnership: *Bopp vs. Fox*, 63 Ill. 540; *Chandler vs. Lincoln*, 52 Ill. 77; *Menagh vs. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683. This rule applies to the interest of a partner in the profits or good will of the partnership business, as well as to the tangible assets of the firm. Until plaintiff's actual interest in the partnership has been determined, there can be no ascertainment of his damages: *Buckmaster vs. Gowen*, 81 Ill. 153; *Sweet vs. Morrison*, 103 N. Y. 235.

We are clearly of the opinion that, on the facts stated in his declaration, plaintiff has no standing in a court of law. * *

Affirmed.

NOTE: See Mechem's Elem. of Partn., §§ 97, 99, 226.

See also *Reed vs. Gould*, 105 Mich. 368, 63 N. W. 415, 55 Am. St. Rep. 458.

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## ROBINSON BANK vs. MILLER.

*Supreme Court of Illinois, 1894.*

**153 Ill. 244, 46 Am. St. Rep. 883, 27 L. R. A. 449, 38 N. E. Rep. 1078.**

This was an action by the Robinson Bank to set aside three mortgages. The defendants by cross-bill asked for a foreclosure of these mortgages. The court below set aside one mortgage and foreclosed the others. John S. Emmons, Frank O. Miller and John Newton owned undivided interests in a milling property of four acres. They afterwards, by oral agreement, entered into partnership to operate the mill under the firm name of Newton, Emmons & Miller. John S. Emmons borrowed $1,800 of the Robinson Bank on a note endorsed by

his father and father-in-law, Wiley S. Emmons, and William W. Walter. The latter had to pay the note and John S. Emmons gave them a mortgage on his interest in the property to secure them. John S. Emmons had also previously given a note for $1,500 for part of the purchase price of his interest, endorsed by his brother Willis Emmons. The latter had to pay this note and John S. gave him a mortgage at the same time that he gave the one to his father and father-in-law. Miller had also at about the same time given a mortgage upon his interest to his brother-in-law, Lamport, to secure a note for $5,500, given to the latter. The firm of Newton, Emmons & Miller became indebted to the Bank for $21,585.32, and was insolvent. The Bank desired to obtain the milling property in part payment, and offered to allow $16,000 for it. Newton and Miller conveyed their interests to the Bank "subject to incumbrances." Emmons also conveyed his interest, and all confessed judgment to the Bank. The Bank claimed precedence over the three mortgages.

The two given by Emmons were sustained, and the one given by Miller was defeated by the court below.

The Bank and Lamport appealed.

*Callaghan, Jones & Lowe*, for appellants.

*Parker, Crowley & Bogard*, for appellees.

MAGRUDER, J. The Robinson Bank, one of the appellants herein, claims that the mill property, including the four acres of land upon which the mill was located, was partnership property belonging to the firm of Newton, Emmons & Miller; that as such it was first liable to be subjected to the payment of the partnership creditors, including the Bank; that the mortgagees, Lamport, Walter, and Willis and Wiley S. Emmons, were individual creditors of Miller and John S. Emmons, and only entitled to such surplus as might arise out of the mill property after the payment therefrom of the firm debts.

Whether real estate upon which a partnership transacts its business is firm property or the property of the individual members of the firm is oftentimes a difficult question to determine, and one upon which the authorities are not altogether uniform. The mere fact of the use of land by a firm does not make it partnership property. *Goepper vs. Kinsinger*, 39 Ohio

St. 429; *Hatchett vs. Blanton*, 72 Ala. 423. Nor is real estate necessarily the individual property of the members of a firm because the title is held by one member, or by the several members in undivided interests. 1 Bates, Partn. § 280. Whether real estate is partnership or individual property depends largely upon the intention of the partners. That intention may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed the circumstances usually relied upon to determine the question are the ownership of the funds paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm. 1 Bates, Partn. § 280; 2 Lindl. Partn. marg. p. 649; 17 Am. & Eng. Enc. Law, p. 945, and cases in note. Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and in such case it makes no difference, in a court of equity, whether the title is vested in all the partners, as tenants in common, or in one of them, or in a stranger. T. Pars. Partn. (4th Ed.) § 265; 1 Bates, Partn. § 281; *Johnson vs. Clark*, 18 Kan. 157; 17 Am. & Eng. Enc. Law, p. 948, and cases cited. If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application. *Parker vs. Bowles*, 57 N. H. 491; 1 Bates, Partn. § 281.

In the case at bar the land was not purchased with partnership funds. The undivided one-third interest bought by John S. Emmons was paid for by him with his own individual money. Miller also paid for the one undivided one-third interest, purchased by him with his individual funds. None of the money of the firm of Newton, Emmons & Miller was contributed towards the purchase of the one-third interest held by Newton. Indeed, the proof shows that the firm of Newton, Emmons & Miller was formed by an oral agreement after Emmons and Miller had bought their interests. Each partner here held the title to an undivided one-third part of the property. No entries were made upon the books of the firm showing that the real estate was treated as firm assets. The evi-

dence, however, does show that the property was bought for the purpose of being used in the milling business, and that after its purchase it was used for firm purposes, and that the firm gave its notes to pay for repairs, and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners, holding as tenants in common? It cannot be said that the land is firm property, upon the theory of a resulting trust, because the money of the firm was not used to buy the property. Such a trust might exist in favor of the firm, regarding it as a person, if the partners had taken the legal title, and the firm had advanced the purchase money. The trust must arise at the time of the execution of the conveyance, and when the title vests in the grantee. Such could not have been the case here, under the facts stated. *Van Buskirk vs. Van Buskirk*, 148 Ill. 9, 35 N. E. 383. In view of the fact that the land was bought with individual, and not partnership, funds, and was conveyed in undivided interests to the several partners, and in the absence of any agreement that it should be regarded as firm property, does the conduct of the parties in afterwards forming a partnership, and using the property for partnership purposes, and repairing and improving the mill at the expense of the firm, make the land firm property, in a court of equity? A negative answer to this question is found in many of the authorities, as will be seen by reference to the following: *Alexander vs. Kimbro*, 49 Miss. 529; *Theriot vr. Michel*, 28 La. Ann. 107; *Reynolds vs. Ruckman*, 35 Mich. 80; *Parker vs. Bowles*, 57 N. H. 491; *Thompson vs. Bowman*, 6 Wall. 316; *Frink vs. Branch*, 16 Conn. 260; *Wheatley's Heirs vs. Calhoun*, 12 Leigh 264, 37 Am. Dec. 654; *Sikes vs. Work*, 6 Gray, 433; *Gordon vs. Gordon*, 49 Mich. 501, 13 N. W. 834; *Moody vs. Rathburn*, 7 Minn. 89 (Gil. 58); *Paige vs. Paige*, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799, *post*; T. Pars. Partn. (4th Ed.) § 266; *Hatchett vs. Blanton*, *supra*.

The general doctrine of all these cases is that a purchase of the land with partnership funds is necessary to make it firm property. T. Parsons, in his work on Partnership (4th Ed.), says: "Although it [real estate] be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants or ten-

ants in common. * * * So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it." Sections 265, 266. In *Hatchett vs. Blanton, supra*, the supreme court of Alabama says: "Steering clear of all cases of fraud, or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership." In *Thompson vs. Bowman, supra*, the supreme court of the United States say: "In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common." *Buchan vs. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 350. The theory of some of the cases is that real estate bought with separate, and not partnership, funds, cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lands, unless by writing, in view of the statute of frauds, except such as results by implication of law. *Parker vs. Bowles, supra.* There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm. 1 Bates, Partn. §§ 281, 282. The use of the property is not conclusive of its character as real estate or personality, but is only evidence of the intention of the parties. Id. § 285. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. T. Pars. Partn. § 267. And, where it is sought to show a conversion of the land into personalty by agreement of the partners, such agreement must be clear and explicit. 17 Am. & Eng. Enc.

Law, p. 954, and cases cited. In *Alkire vs. Kahle*, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540, land was conveyed during the existence of the partnership to "Cato Abbott and Henry Robinson, composing the firm of Abbott & Robinson"; and it was held not to be partnership property, because it was not shown to have been either purchased with partnership funds, or used for partnership purposes; but we do not regard that case as holding that the mere use of the land for partnership purposes constitutes it firm property. In *Mauck vs. Mauck*, 54 Ill. 281, land which had been bought and held for firm purposes was said to be firm property, and to partake of the character of personalty; but in that case a part of the business of the firm was to buy and sell real estate, and, although the land was said to belong to the firm, it does not appear that it was not purchased with partnership funds. In *Faulds vs. Yates*, 57 Ill. 416, 11 Am. Rep. 24, the land was bought for the use of the partnership, but after the partnership was formed, and with the money of two of the partners. In *Bopp vs. Fox*, 63 Ill. 540, land, bought by four partners with their individual funds, and conveyed to them in their individual names, was held to be partnership property, because, two weeks before the purchase, the four purchasers made, not a mere executory agreement to form a partnership at a future time, but a "present, verbal agreement of partnership," and then afterwards bought the land, and began the erection of a mill for the purpose of carrying on the milling business as a firm "already formed under the verbal agreement." It was there held that the essential question was whether the purchase money "was paid as partnership money for a partnership purpose," and we said, "We consider this was essentially a purchase with partnership funds for partnership purposes."

The weight of authority seems to us to support the position that where persons who afterwards become partners buy land in their individual names and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present

case shows the real estate here in controversy to be firm property. The testimony proves affirmatively that there was no agreement, written or verbal, to put the land into the firm as a firm asset, and that it was treated by the parties as individual property. John S. Emmons insured his interest separately. When he gave his note for $1,500, signed by his brother as surety, in part payment of the purchase money for the land, he promised his brother that he would give him a mortgage on his one-third interest when the master's certificate, issued to him at the sale, should ripen into a deed; and the mortgage afterwards made was given as soon as the master's deed was obtained. Four months after the purchase, when he borrowed $1,800 of the bank upon his note, signed by his father and father-in-law as sureties, he stated to the bank that he intended to mortgage his interest to his sureties to secure them. About this time, Newton, Emmons & Miller paid $5,400 in cash for improving the mill; but this amount was contributed by the partners, not out of partnership funds, but by the contribution of their individual moneys, each paying one-third. The one-third so paid by John S. Emmons was the $1,800 borrowed on his note. The bank itself, in procuring deeds from the partners in September, 1884, dealt with them as owners of separate interests. Each member of a partnership has a superior lien on the partnership property for the payment of the firm debts. This equitable lien of the partners is worked out for the benefit of the firm creditors. *Hapgood vs. Cornwell*, 48 Ill. 65, 95 Am. Dec. 516. Hence, partnership property must be first applied to the payment of partnership debts; and the true interest of each partner in such property is the balance found to be due to him after the payment of the firm debts, and the settlement of accounts between the partners. *Bopp vs. Fox, supra.* In equity, real estate stands on the same footing in this respect as personal property. *Alkire vs. Kahle, supra.* It results that there can be no dower interest in real estate owned by a partnership until all the partnership debts are paid and the partnership accounts are adjusted. *Trowbridge vs. Cross*, 117 Ill. 109, 7 N. E. 347. If the land in controversy was firm property in September, 1884, there were no dower interests at that time in the wives of Newton, Emmons, and Miller; and yet their wives were required by the bank to sign the deeds to its trustee, Woodworth, and one of them was paid $200 for her signature.

There is no question about the bona fide character of the mortgages to Willis Emmons and Wiley S. Emmons and W. W. Walter. They paid the judgments upon the notes of John S. Emmons, upon which they were sureties, and those notes were given for borrowed money expended in the purchase and improvement of the mill property. We think the mortgages have been properly sustained as resting upon an undivided one-third interest in the land, which must be regarded, under all the circumstances of this case, as the separate property of John S. Emmons.

But, even if the interest held by John S. Emmons was firm property, there is nothing to show that the holders of the mortgages thereon had notice, or reasonable ground for believing, that it was firm property. The record title was in John S. Emmons, and all the circumstances coming to their knowledge, as heretofore stated, were calculated to create the impression that his real interest was that indicated by the record. Facts showing a partnership in the milling and grain business were not necessarily notice of a partnership in the land. Now, it is well settled that a bona fide purchaser or mortgagee of firm property, from one of the partners holding the legal title, without notice of its partnership character, will hold it free from partnership claims. T. Pars. Partn. (4th Ed.) §§ 277, 278; 1 Bates, Partn. § 291; *Dyer vs. Clark*, 5 Metc. (Mass.) 562; Colly. Partn. (Perk. Ed.) § 135. When a firm and its members are insolvent, and the firm has been dissolved, an equity exists in favor of the creditors of the firm in respect of the lands purchased with partnership funds, which is superior to that of the creditors of the individual partners; but there may be cases where an equal or superior equity may be created in favor of a creditor of an individual member of the firm, as where one has furnished to one of the members the capital upon which the business was commenced. *Reeves vs. Ayers*, 38 Ill. 418. By signing the note for $1,500 as surety, Willis Emmons enabled John S. Emmons to purchase an interest in the mill property, and, if that interest was a partnership asset, he thereby aided in procuring a part of the firm capital. In addition to what has been said, we think the evidence shows that the officers of the bank, if they did not actually make an agreement to that effect, gave John S. Emmons to understand that the bank would protect the mortgages on his interest if he and his wife

would sign the deed to the bank. The consideration of that deed was just the amount of the two mortgages, and four witnesses swear that one of the officers of the bank promised to take care of the mortgages. When a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as to change his previous position, the former will be estopped to aver against the latter a different state of things. *Casler vs. Byers*, 129 Ill. 657, 22 N. E. 507.

As to the mortgage made by the appellant Miller to Lamport, the lower courts have found that that mortgage was not made in good faith, and was not given to secure a bona fide indebtedness. It is claimed that the note for $5,500, secured thereby, was given for money loaned to Miller by his wife and by his brother-in-law, Lamport. It is true, that the fact of the relationship between the parties is no proof of fraud, although it may be a circumstance to excite suspicion. *Wightman vs. Hart*, 37 Ill. 123. But we are not satisfied from the evidence that the money alleged to have belonged to Mrs. Miller was not the money of Miller himself. If any funds were loaned to him by Lamport, it is not possible to fix their exact amount separately from those alleged to have been borrowed of Mrs. Miller. The witnesses contradict each other as to amounts, and as to the times and places of payment. There is refusal to answer questions, and failure to explain matters needing explanation. We have examined all the testimony, as contained in the original record, and we cannot say that the circuit court erred in the conclusion reached by it in regard to this mortgage, or that the appellate court has erred in agreeing with the circuit court. It is true that the deed from Miller and Newton to the bank contains the words, "subject to incumbrances," but we think the reference here is to incumbrances which are made in good faith. The facts about the mortgage were not known when the deed was executed. There is some conflict in the evidence as to whether the parties intended to refer to the Lamport mortgage, or to certain liens claimed to exist in favor of creditors who had furnished machinery for the mill. But even if the words refer to the Lamport mortgage alone, it is not certain from the testimony that the amount of that mortgage was a part of the consideration for the execution of the deed. The grantee in a deed, who purchases subject to an incumbrance to

secure indebtedness, may not be under obligations to pay such indebtedness, if its amount is not included in, and does not form a part of, the consideration of the conveyance. *Drury vs. Holden*, 121 Ill. 130, 13 N. E. 547. The amount named as the consideration in the deed was simply the agreed value of Newton's interest, and did not include any part of this mortgage. The amount of the actual consideration agreed to be paid by the bank for the deed of Miller's interest, to wit, $5,333.33 (one-third of $16,000), was paid by a credit of that amount on the firm indebtedness of $21,585.23 due from Newton, Emmons & Miller to the bank. The judgment of the appellate court and the decree of the circuit court are affirmed. Affirmed.

NOTE: See also Mechem's Elem. of Partn., §§ 106, 107, 109; also the exhaustive note in 27 L. R. A. 449.

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## NATIONAL UNION BANK OF MARYLAND vs. NATIONAL MECHANICS' BANK OF BALTIMORE, *et al.*

*Court of Appeals of Maryland, 1894.*

80 Md. 371, 30 A. 913, 27 L. R. A. 476, 45 Am. St. Rep. 350.

Appeal from circuit court of Baltimore city.

In the matter of the trust estate of G. W. S. Hoffman and others, late copartners trading as W. H. Hoffman & Sons, and of the individual members of said firm. Appeal by the National Union Bank of Maryland from an order overruling the exceptions filed by appellant to the auditor's account, and also its exceptions to the admissibility of certain evidence. Reversed

Argued before ROBINSON, C. J., and BRYAN, MCSHERRY, FOWLER, BRISCOE, and BOYD, J. J.

*Steele, Semmes & Carey*, for appellant.

*Barton & Wilmer*, for appellees.

BOYD, J. In October, 1893, George W. S. Hoffman, W. E. Hoffman, and John W. Hoffman, partners trading under the firm name of W. H. Hoffman & Sons, executed a deed of trust, in which their wives joined, to John B. Ramsay and Simon P. Schott, by which they conveyed all their property, "including all of the joint stock of the copartnership and all of the separate estate of each of the partners, in trust for the payment of partnership and individual creditors according to their respective rights and interests therein." The circuit court of Baltimore city assumed jurisdiction of the trust, and after the sale of the property, which will be more particularly hereinafter referred to, an audit was made, distributing the proceeds of sales, etc. The appellant held at the time of the assignment two notes of the firm, each being for the sum of $5,000, and endorsed by George W. S. Hoffman and J. W. Hoffman, individually. With each note there were deposited bonds of the Gunpowder Valley Railroad Company, of the par value of $7,500, as collateral security, with the usual authority to the bank to sell at public or private sale in case of default.

The appellant filed its claim for the amount of the notes, together with costs of protest, against the estates of the firm and of the individual indorsers. The National Mechanics' Bank of Baltimore excepted to the allowance by the auditor of the claim of appellant, because it had not credited the value of the collateral security held by it; and the appellant excepted to the audit for the reason, as it alleges, that the real estate held and owned by the three members of the firm was their individual property, and not partnership assets. An agreement was filed, in which certain facts are admitted, and the court below was authorized to pass a *pro forma* order sustaining the exceptions to the claim of the appellant, and overruling those filed by it. A *pro forma* order was accordingly passed, and an appeal taken to this court.

The principal questions presented for our consideration are. (1) Is the appellant entitled to a distribution on its whole claim, without crediting the value of the securities held by it as collateral? (2) Is the real estate held by the members of this firm to be treated as partnership or individual property, so far as the appellant is concerned?

(Omitting the discussion of the first question.)

In considering the question as to the right of the appellant to have the real estate treated as the individual property of the

members of the firm, and not as partnership assets, we must bear in mind the fact that W. H. Hoffman was the original owner of all this property, and that while it was thus owned by him he was in partnership with his three sons, trading under the name of William H. Hoffman & Sons, being the style of the firm subsequently adopted by them. If a deed of trust similar to the one made by the sons had been made in the lifetime of the father, by the members of the original firm, it would hardly be contended that the real estate should be treated as partnership property,—certainly not as against the individual creditors of William H. Hoffman. By his last will and testament, the senior Hoffman charged an annuity upon the Gunpowder Mill property, for the purpose of keeping a burying ground, etc., in proper condition, and made certain provisions for his wife. He directed his executors to ascertain the value of the rest of his property, and gave it—with the exception of one-twentieth thereof, left to Peter Vondersmith, his son-in-law —to his three sons and his daughter, Lydia A. Smyser, to be divided between them equally, share and share alike. He directed that in the division his son John W. Hoffman should have the property known as the "Gunpowder Mill," chargeable with the annuity aforesaid, together with certain water rights and 400 acres of land connected therewith, known as "Paper Mill Hills;" also a part of the tract of the land known as "Laurel Hills," 100 yards wide on each side of a stream.

He also directed that in the distribution his son George W. S. Hoffman was to have the Marble Vale Mill property, containing 218 acres, and his son William E. Hoffman was to have his Clipper Mill, together with a tract of land called "Gristmill Hills," containing 257 acres; also a tract called "Addition to Grant Mill Hills," containing 7¼ acres, and some houses named by him. He provided that the property thus given to his three sons should be taken by them in the distribution at the prices or values fixed by the appraisers, as provided for in his will, and then directed that "all the rest of my property and estate, not hereinbefore devised or specially distributed, * * * shall be sold or disposed of by my said executors, * * * and the proceeds of such sale or sales be so distributed among my said four children as to make the share of each, under these provisions of my will, equal the one to the other."

Subsequently, his son-in-law and his daughter conveyed their

respective interests to the three sons, "as individuals." It is admitted in the agreed statement of facts that after the father died the three sons continued to trade under the firm name of William H. Hoffman & Sons, and opened on their firm books an account headed "Real Estate," in which they entered all the property so derived by them, and continued the same on their books in that way; "that, between the said three sons, all the said real estate was always considered, in their business, as copartnership property, and was treated between themselves as such, but that the title to the same appeared in the land records of Baltimore county and in the office of the register of wills of Baltimore county as having been derived by them under the will of their said father and the conveyances of said Vondersmith and Smyser, as has been hereinbefore stated, and no conveyance was made by them to the said partnership."

It must be conceded that there is nothing on the face of the will that would indicate any intention of the testator to vest the property in his three sons, as partners; but, on the contrary, it is apparent that he intended them to own individually certain properties, which he directed to be given them as above stated. The property was, at the time the partnership was formed, the individual property of the three members. So far as the record discloses, nothing has since been done to transfer the property to the firm, or vest any interest in it, excepting the entries in the books, and the fact that the real estate was considered in the business as copartnership property, and so treated between the members, as above stated. We are therefore met with the inquiry whether that is sufficient to authorize a court of equity to treat the proceeds of sale as partnership assets, when called upon to decide between the creditors of the firm and those of the individual members. If this property had been purchased with partnership funds, for the use and on account of the firm, it would be immaterial that the title stood in the name of the individual members, as a court of equity would treat it, for all the purposes of the partnership, as firm property; and hence it would be liable to the partnership creditors, to the exclusion of the individual creditors, until the former are satisfied. In that case there would be an implied or constructive trust in favor of the partners, as such, which would inure to the benefit of the creditors of the firm. But, when it has been acquired in the manner above stated, the question arises whether those dealing with the members of the firm have not the right, in the absence

of some notice or knowledge to the contrary, to assume that the public records inform them correctly as to the ownership of the property, notwithstanding the private understanding between the partners themselves.

Creditors have sometimes suffered great hardships by courts of equity declaring property standing in the name of one person to be in trust for the benefit of others; but such decisions are rendered to prevent injustice being done those whose money purchased the property, and relief is only granted to them when their claims are established by clear, direct, and explicit proof. This court has said: "This strictness of proof is required because of the danger of rendering titles depending upon deeds and other written documents insecure." *Witts vs. Horney*, 59 Md. 587. The same reasoning applies to real estate held of record by members of a firm as tenants in common. When it is sought to change such property from individual to partnership property, the record evidence all pointing to it being the former, a court of equity should not act upon doubtful proof, particularly when the rights of strangers or third parties are to be affected. The public records will be of but little avail, if the private books and intentions of partners are to entirely control and determine the character of ownership of real estate. If property is purchased with partnership funds, and conveyed to one or more of the partners, as individuals, the entries of the firm books would have great—possibly controlling—weight as to whether it should be treated as partnership or individual property; but courts should require more than private entries and understandings between partners, to overcome the public records, in cases such as this.

No one would suppose, from reading the will of William H. Hoffman, that the property belonged to the partnership. Persons dealing with the individual members would be led to believe, from that will, that they owned the property individually; and, inasmuch as it was once the separate property of the members, we are not prepared to break down all the safeguards and protection intended by our registry acts, by announcing as the law of this State that partners can so change the character of real estate, originally owned by them as individuals, and not in any way derived from the partnership, as to give priority to firm creditors over their separate creditors, simply by making entries in their books, and treating it between themselves as partnership property, without giving some notice, or doing some

acts equivalent to notice, to their individual creditors. The agreed statement of facts does not show that the appellant had notice of any facts that should have put its officers on inquiry.

The statement is not as full as it might have been. It does not even show what business the firm was engaged in. But from the arguments, and what we gather from the record, we assume that they were manufacturing paper. Nor is it definitely stated whether the business was conducted in one or more paper mills, although it is shown that William H. Hoffman died owning real estate consisting of three paper mills, farm lands, etc. It would certainly have been much more satisfactory if the facts had been fully set out, so as to enable the court to understand the exact character and extent of the use of the real estate by the firm. But it is admitted that the property was acquired under the will of William H. Hoffman, and by the deeds of Mr. Vondersmith and Mrs. Smyser, and that no conveyance was made by the members of the firm to the partnership. As to what uses, if any, this firm, engaged in manufacturing paper, made of the farm, dwelling houses, and other property not necessarily incident to the paper mills, the record is silent; but it is certain that, without some notice that they were treated as partnership property, no one dealing with the individual members of the firm would be expected to so regard it; and the ordinary use of that kind of property, such as cultivating or renting the farms, occupying or renting the houses, etc., would not put creditors on inquiry, or be sufficient notice that they were treated as partnership property.

If the paper mills themselves, and such other real estate as would properly be used in connection with them, were treated by the partners as firm property, and were so used as to give notice to creditors of the individual members of the firm that they had been put into the partnership as part of the common stock, and were entered on the books of the firm in such way as to comply with the statute of frauds, then the partnership creditors might properly be given priority over the separate creditors, to the extent of the proceeds of sales of such property. The record does not disclose such facts as would justify us in determining that question; but, as the decree must be reversed, the court below can authorize testimony to be taken on that subject. We have carefully examined the authorities cited by the counsel for the respective parties, as well as many others,

and have found considerable apparent conflict between some of them. But, when the facts of them are carefully examined, it will be found that the most of them are in accord with our conclusions, which might be summarized as follows:

(1) That as the farms, houses, and similar property were not purchased with partnership funds, for partnership purposes, but were, as far as the public records show, the separate property of the individual members, and were not incident to the business of the firm, the fact that the partners entered them on the firm books, and treated them as firm property, is not sufficient to change them into partnership property, and the proceeds of sales of them should be applied to the payment of the claims of individual creditors prior to those of the partnership creditors.

(2) That if the paper mills, and such other real estate connected therewith as would be necessary for the convenient and proper conduct of the business, were treated by the partners as partnership property, were put into the firm business as part of the common stock, and were so entered in the books of the firm as to comply with the statute of frauds, then the partnership creditors should have priority over the general creditors of the individual partners, in the distribution of the proceeds of sale of such property, provided this class of property was so used as to give notice to the latter that it was treated as partnership property, and was substantially involved in the business of the firm. * * *

The decree *pro forma* must be reversed, and the cause remanded for further proceedings in accordance with this opinion. Decree reversed and cause remanded, with costs to the appellant.

NOTE.—See Mechem's Elem. of Part'n §§ 106, 107. See also *McKinnon vs. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, 12 U. S. App. 433.

## SHANKS vs. KLEIN.

*Supreme Court of the United States, 1881.*

104 U. S. 18, 26 L. Ed. 685.

This was a bill in chancery filed by John A. Klein and others against David C. Shanks, executor of the last will and testament of Joseph H. Johnston.

The substance of the bill is that in the lifetime of Johnston there existed between him and Shepperd Brown a partnership, the style of which was Brown & Johnston; that their principal place of business was at Vicksburg, in the State of Mississippi, where they had a banking house; that they had branches and connections with other men in business at other places, among which was New Orleans; that they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent civil war; that this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business; and that early in the war, namely, in 1863, Johnston died in the State of Virginia, where he then resided, leaving a will by which all his property, including his interest in the partnership, became vested in Shanks, who was appointed his executor.

It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war—the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston, and the other firms with which that was connected. Finding that suits had been commenced by creditors of the firm against him as surviving partner, and, in some instances, attachments levied, he became satisfied that unless he adopted some mode of disposing of the partnership property and applying its proceeds to the payment of the debts in their just order, the whole would be wasted or a few active creditors would absorb it all. Under these circumstances, acting by advice of counsel, he executed a deed conveying all the property of the firm of Brown & Johnston to John A. Klein, in trust for the

creditors of that partnership, and providing that the surplus, if any, should be for the use of the partners and their heirs or devisees. Klein accepted the trust, and pursuant thereto paid debts with the lands, or with the proceeds of the sale of them.

There is an allegation that Shanks, while acting as executor, and about the time the deed of trust was made, had an interview with Brown, and, being fully informed of the condition of the affairs of the partnership, expressed his approval of what Brown intended to do. This is denied in the answer, and some testimony is taken on the subject. Other questions of bad faith on the part of Brown are raised. But in the view which we take of the case the record establishes that Brown acted in good faith, and did the best that could be done for the creditors of the partnership and for those interested in its property.

It appears that after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will, instituted actions of ejectment against them. They thereupon filed this bill to enjoin him from further prosecuting the actions, and compel him to convey the legal title to the real estate which came to him by the will of his testator. A decree was rendered in conformity with the prayer of the bill, and Shanks appealed.

*W. B. Pittman*, and *J. Z. George*, for appellant.

*E. D. Clark*, for appellees.

MILLER, J. (After stating the facts as above). Being satisfied, as already stated, of the fairness and honesty of the proceedings of Brown and Klein and of the purchasers from them, and waiving as of no consequence, in regard to the principal point in the case, the allegation of Shank's concurrence in or ratification of Brown's action, we proceed to consider the question as to the power or authority of Brown, the surviving partner, to bind Shanks by the conveyance to Klein, and by the sales thereunder made.

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes within the rule of equity on that subject. Nor is it denied

by the counsel who have so ably argued the case for the appellant that the equity of the creditors of the partnership to have their debts paid out of this property is superior to that of the devisee, Johnston. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a court will enforce against Shanks as the holder of that title.

Counsel for the appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided molety which was originally in Johnston, maintain that Brown, as surviving partner, had, for the purpose of paying the debts of the partnership, power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, that the trust deed which he made to Klein was effectual for that purpose, and that by Klein's sales to the other appellees they became invested with this equitable title and the right to compel Shanks to convey the legal title.

One of the learned counsel for the appellant concedes that at the present day the doctrine of the English court of chancery "extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of the deceased partner the land as personalty, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence, that partneship real estate is in fact in all cases, and to all intents and purposes, personalty." He maintains, however, that the principle has not been carried so far in the courts of America; that the extent of the doctrine is that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the firm, and for any balance found due to either partner on a final settlement of the partnership transactions; and that the right of the surviving partner, and of the creditors through him, is no *more than a lien*, which cannot be asserted by a sale, as if the property were personal, but to the enforcement of which a resort to a court of equity is necessary.

We think that the error which lies at the foundation of this

argument is in the assumption that the equitable right of the surviving partner and the creditors is nothing but a lien.

It is not necessary to decide here that it is not a lien in the strict sense of that word, for if it be a lien in any sense it is also something more.

It is an equitable *right* accompanied *by an equitable title.* It is an *interest in the property* which courts of chancery will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English court of chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject.

We think, also, that the preponderance of authority in the American courts is on the same side of the question.

In the case of *Dyer vs. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697, that eminent jurist, Chief Justice SHAW, while using the word "lien" in reference to the rights now in controversy, asks, "What are the true equitable rights of the partners as resulting from their presumed intentions in such real estate? Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest indirectly in the same appropriation; not because they have any lien, legal or equitable (2 Story, Eq., § 1253), upon the property itself; but on the equitable principle that the real estate so held shall be deemed to constitute a part of the fund from which their debts are to be paid before it can be legally or honestly diverted to the private use of the parties. Suppose this trust is not implied, what would be the condition of the parties?" etc. "But treating it as a trust, the

rights of all the parties will be preserved." It is clear that in the view thus announced the right of the creditors is something more than an ordinary lien.

In *Delmonico vs. Guillaume*, 2 Sandf. (N. Y.) Ch. 366, where the precise question arose which we have in the present case, the vice-chancellor held that "Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John he had an absolute right to dispose of it, for the payment of the debts of the firm, in the same manner as if it had been personal estate."

In so deciding he followed the English authorities, and cited *Fereday vs. Wightwick*, 1 Russ. & M. 45; *Phillips vs. Phillips*, 1 Myl. & K. 649; *Broom vs. Broom*, 3 Ib. 443; *Cookson vs. Cookson*, 8 Sim. 529; *Townshend vs. Devaynes*, 11 Ib. 498, note.

In *Andrews' Heirs vs. Brown's Adm'r*, 21 Ala. 437, the supreme court said that, "inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of paying the debts and at the same time take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts and the survivor is charged with this duty, his deed will convey the equity to the purchaser, and through it he may call on the heir for the legal title and compel him to convey it."

In *Dupuy vs. Leavenworth*, 17 Cal. 262, Chief Justice FIELD, in the name of the court, said: "In the view of equity it is immaterial in whose name the legal title of the property stands—whether in the individual name of the copartner, or in the joint names of all; it is first subject to the payment of the partnership debts, and is then to be distributed among the copartners according to their respective rights. The possessor of the legal title in such case holds the property in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this

equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title."

If the case could be held to be one which should be governed by the decisions of the courts of Mississippi, because the principle is to be regarded as a rule of property, which we neither admit or deny, the result would still be the same.

In one of the earliest cases on that subject in the high court of errors and appeals of that state, *Markham vs. Merritt*, 8 Miss. 437, 40 Am. Dec. 76, Chief Justice SHARKEY, in delivering the opinion of the court, concurs in the general doctrine that "when land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel." A careful examination of the Mississippi cases cited by counsel has disclosed nothing in contravention of this doctrine, or in denial of the authority of the surviving partner to dispose of such property for the payment of the debts of the partnership.

We are of the opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, that they had a right to the aid of a court of chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston.

Decree affirmed.

NOTE—See also Mechem's Elem. of Partn., §§ 105, 111.

## PAIGE vs. PAIGE.

*Supreme Court of Iowa, 1887.*

71 Iowa 318, 32 N. W. Rep. 360, 60 Am. Rep. 799.

On February 2, 1880, Simon B. and John A. Paige, being in partnership, under the firm name of S. B. & J. A. Paige, bought certain mill property with partnership funds but took the title in their individual names. On February 6, 1880, they united with R. F. Paige and E. W. Dixon to form a new firm to be known as Paige, Dixon & Co. The partnership articles provided that one-fourth interest in the milling property should be conveyed to each of the new partners upon their paying an agreed sum. The new firm took possession of the property, operated and improved it. In August, 1881, R. F. Paige died and S. B. and J. A. Paige acquired his interest in the property, the business being continued under the former name, until the death of S. B. Paige. At his death, the firm and all members thereof were insolvent. The widow of S. B. Paige claimed dower in the milling property. The heirs of S. B. Paige, his administrator, J. A. Paige, Dixon, and Brown, a creditor, were all made parties. The widow's claim being denied, she and the administrator appealed.

*Bills & Block*, for appellant.

*Davison & Lane* and *Stewart & White*, for appellees.

ROTHROCK, J. (After stating the facts.) The parol evidence in the case shows quite conclusively that, at the time the conveyance of the property was made, S. B. Paige stated that the purchase was made by the partnership of S. B. & J. A. Paige, and the property belonged to the partnership, and he desired the deed to be made in the name of the partnership; but that, under the advice of counsel, it was made in the individual names of the members of the firm, so that, if the property should be subsequently sold, it would not be necessary to prove who were the proper parties to join in a conveyance.

This evidence, and all of the other parol evidence tending to show that the property was purchased and paid for by the part-

nership, is objected to by counsel for the plaintiff upon the ground that a written conveyance of real estate cannot be varied by parol. It is insisted that such evidence is incompetent, under the statute, which provides that "conveyances to two or more, in their own right, create a tenancy in common, unless a contrary intent is expressed." Code, § 1939. And the following provisions of the code are also relied upon: Section 1934: "Declarations or creations of trust or power, in relation to real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law." Sections 3663 and 3664 provide that no evidence of any contract for the creation or transfer of any interest in lands (except leases for a term not exceeding one year) shall be competent, "unless in writing, signed by the party to be charged."

Appellant concedes that, if the property had been paid for with partnership money, and one of the partners had taken the title to the whole, there would be a resulting trust for the benefit of the firm. But it is claimed that, as each received the legal title to just the share he was equitably entitled to, there can be no resulting trust. The evidence in the case shows quite satisfactorily that payment for the property was made, not with the money of each individual partner, but with the undivided money of the partnership. It seems to us it is wholly immaterial whether the conveyance was made to one or both the partners. The law recognizes the partnership as a person distinct from the individual members of the firm, and, this person or partnership, having paid its money for the property, there was a resulting trust in its favor, no matter in whose name the title was taken.

In the notes to *Coles vs. Coles*, 1 Amer. Lead. Cas. (Hare & W.) 487, it is said: "If land is bought with partnership funds, and is brought into the business of the firm and used for its purposes, it will be considered as partnership stock, *in whose name soever the legal title may be unless there be distinct evidence of an intention to hold it separately*, such as an express agreement in the articles of copartnership, or at the time of the purchase, or the fact that the price is charged to the partners respectively in their several accounts with the firm; for such arrangements would operate as a division and distribution of so much of the funds, and each would take his share divested of any *implied*

*trust*; but the mere circumstances that the conveyance was to them *expressly as tenants in common*, would not, of itself, be sufficient to rebut the trust."

In 2 Story, Eq. § 1207, it is said: "Where real estate is purchased for partnership purposes, and on partnership account, it is wholly *immaterial*, in view of a court of equity, *in whose name or names the purchase is made* and the *conveyance taken*—whether in the name of *one* partner, or of *all* partners; whether in the name of a stranger alone, or a stranger jointly with one partner. In all these cases, let the *legal* title be vested in whom it may, it is in equity deemed partnership property, not subject to survivorship, and the partners are deemed the *cestuis que trust* therefor."

This court has frequently held that where land is purchased with partnership funds, and intended to be used for partnership purposes, it is to be treated as personal assets of the partnership. *Evans vs. Hawley*, 35 Iowa 83; *Hewitt vs. Rankin*, 41 Iowa 35; and other cases. In such case the trust is not an express one, but is implied or results from the operation or construction of the law, and is within the exception named in section 1934 of the code, and such a trust may be shown by parol evidence. *York vs. Clemens*, 41 Iowa 95; *Cotton vs. Wood*, 25 Iowa 43; *Fairchild vs. Fairchild*, 64 N. Y. 471.

The cases of *Hale vs. Henrie*, 2 Watts, 143, 27 Am. Dec. 289; *Kramer vs. Arthurs*, 7 Pa. St. 165, and *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586, hold that, "where partners intend to bring real estate into the partnership, their intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived." This rule is doubtless correct, so far as the rights of innocent purchasers without notice are involved; but this court is committed to the doctrine above announced, that a purchase of real property with partnership funds, and investing the title in a person or persons other than the partnership, creates a resulting trust in favor of the partnership, and the facts necessary to establish the trust may be shown by parol.

The evidence that the property involved in this case was paid for by the firm of S. B. & J. A. Paige is clear and satisfactory. It consists of the declaration of S. B. Paige, made when the deed was executed, and the recitals in the articles of partnership entered into within a few days after the deed was made,

and the subsequent acts of both of the grantees in the deed is the management and use made of the property.

2. The defendant Brown is a creditor of the firm of Paige, Dixon & Co., and attached the property in controversy in an action upon his claim. His counsel submitted an argument in the cause, the drift of which seems to be a claim, that he, as a creditor of that firm, is entitled to a preference over the creditors of the firm of S. B. & J. A. Paige in the property in controversy. It would be improper to determine that question in this appeal.

3. The administrator of S. B. Paige appealed, and claims that the debts against the estate were contracted while the title to the property was in decedent, and on the faith and credit of the same. He insists that the equities of these individual creditors should not be ignored for the benefit of the firm creditors. But, as the property in controversy is assets of the partnership, it is first liable to the payment of the partnership debts, and a creditor of one of the firm has no claim thereon until such debts are paid. *Evans vs. Hawley*, 35 Iowa 83.

We unite in the conclusion that, as it is conceded that both of the partnerships and all of the surviving members thereof are insolvent, the plaintiff is not entitled to a dower interest in the property in dispute. Affirmed.

NOTE.—See also Mechem's Elem. of Partn., §§ 105, 108.

# VI.

## THE FIRM NAME AND GOOD WILL.

### WILLIAMS vs. FARRAND.

*Supreme Court of Michigan, 1891.*

88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161.

Bill by Wm. C. Williams, Alanson Sheley, and Alanson Sheley Brooks, against Jacob S. Farrand, Richard P. Williams, Harvey S. Clark, and Jacob S. Farrand, Jr., to restrain defendants from using any combination of the names Farrand and Williams, as a part of the firm name of defendants, and from in any way interfering with the complainants' use and enjoyment of the business formerly belonging to "Farrand, Williams & Co.," of which firm complainants claim to be the successors.

The facts appear in the opinion.

The court below dismissed the bill, and complainants appeal.

*William H. Wells* (*Bowen, Douglas & Whiting* and *Ashley Pond*, of counsel), for appellants.

*Moore & Canfield* (*Henry H. Swan* and *F. H. Canfield*, of counsel), for appellees.

McGRATH, J. Complainants and defendants had been for some years engaged as wholesale druggists on Larned street east, in the city of Detroit, as copartners, under the name and style of Farrand, Williams & Co. There were no articles of copartnership, and no term fixed for which the partnership was to continue. Prior to the taking of the annual inventory in January, 1890, defendant, Jacob S. Farrand, expressed to complainant Sheley a desire to dissolve the copartnership. Mr. Sheley declined to say anything until the annual inventory

should be taken, and the business of the year settled up. On the 25th of January, 1890, after the completion of the inventory, defendants made a proposition in writing to "pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., the amount of their interest being fifty thousand dollars ($50,000), the sum of sixty thousand dollars ($60,000), or they will take for their interest, the amount being one hundred thousand dollars ($100,000), the sum of one hundred and twenty thousand dollars ($120,000), the same to be paid in cash, or in notes acceptable to the parties who sell, one week from today, Saturday, the first day of February next. The store to be leased to the party purchasing for a term of five years, at a rent of eight thousand dollars ($8,000) a year, and the warehouse to be rented to the party purchasing, at a net rental of 6 per cent a year on the cost of their interest therein." On the following Monday Mr. Sheley accepted defendants' offer to sell, and on the first day of February following a bill of sale was prepared, reciting, among other things, that defendants, in consideration of the sum of $120,000, paid to them by Alanson Sheley, party of the second part, "have bargained and sold unto the said party of the second part all our right, title, and interest to the within-mentioned resources of said firm, including the good will attendant upon the business." This bill of sale was not executed, objection being made to the clause, "including the good will attendant upon the business;" and a new instrument was prepared, reciting that defendants, parties of the first part, "for and in consideration of the sum of one hundred and twenty thousand dollars, to them paid by Alanson Sheley, of the second part, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams & Company." This instrument was executed, the insurance policies were assigned by Farrand, Williams & Co. to Williams, Sheley & Brooks, and an agreement to assume and pay all the debts of the old firm was executed by Williams, Sheley & Brooks, and delivered to defendants. Defendants afterwards formed a copartnership under the firm name of Farrand, Williams & Clark, and opened a wholesale drug establishment at No. 32 Woodward avenue. Complainants adopted the name and style of Williams, Sheley

& Brooks, posted their firm name, as successor to Farrand, Williams & Co., over their place of business; had the words "Williams, Sheley & Brooks, Successors to" printed in red ink over the words "Farrand, Williams & Co." wherever the latter appeared upon letter heads, bill heads, labels, and on other stationery; advertised themselves in the newspapers and trade journals as Williams, Sheley & Brooks, successors to Farrand, Williams & Co.; and sent out circulars to the trade containing not only their firm name, but the names of the individual members of the new firm. Defendants also extensively advertised the new enterprise through the same mediums, calling special attention to the names of the members of the new firm, their long connection with the drug business, and the dissolution of the old firm, and soliciting trade.

The complainants contend that the assignment by defendants of all interest in the business carried with it the good will of the business, and, having purchased the good will of that business, they are entitled to the exclusive use of the old firm name; that, while defendants have the right to engage in the same line of business, they have not the right to such a collocation of their own names as will produce confusion, attract customers, and secure orders, letters, and goods intended for the old firm; that defendants have no right to simulate their labels, to solicit their customers, or entice away their employés. "Good will" has been defined by this court to be "the favor which the management of a business has won from the public, and the probability that old customers will continue their patronage." *Chittenden vs. Whitbeck*, 50 Mich. 401, 15 N. W. Rep. 526. Lord ELDON, in *Cruttwell vs. Lye*, 17 Ves. 335, defined it as simply the probability that old customers will resort to the old place.

The following propositions must be regarded as established by the clear weight of authority:

1. Though a retiring partner may have assigned his interest in the partnership business, including the good will thereof, to his copartner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

2. He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

3. He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence, will not be allowed to advertise himself as its successor.

4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

5. That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person.

In *Myers vs. Buggy Co.*, 54 Mich. 215, 19 N. W. Rep. 961, and 20 N. W. Rep. 545, A, B and C had been carrying on business as copartners at Kalamazoo, under the name and style of "The Kalamazoo Wagon Company." A, B and C sold to complainant "all their interest in the property, money, assets, and good will," etc., in and to their business. After such sale complainant's assignors formed a corporation under the name of "The Kalamazoo Buggy Company;" pitched their plant in the same locality; commenced the manufacture of the same class of goods; issued circulars to the trade, with descriptive cuts of the same character and appearance as those contained in complainant's circulars, and advertised their place of business as being in the same locality. In that case the name of "The Kalamazoo Wagon Company" was an assumed name. The only distinctive feature in the name adopted by defendants was the use of a word of similar meaning to that for which it had been substituted. The defendants were not using their own names. It was a pure case of piracy, and the facts clearly indicated an intention to deceive the public. As was said in *Burgess vs. Burgess*, 3 De Gex, M. & G. 896: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by him as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that defendant is selling his goods as the goods of the plaintiff." In *Lee vs. Haley*, L. R. 5 Ch. App. 155, plaintiff had been doing business at No. 22 Pall Mall, under the artificial name of "Guinea Coal Company." Defendant, who had been their manager set up a rival business under the name of "Pall Mall Guinea Coal Com-

pany," at 46 Pall Mall. His envelopes and business cards were printed in such a way as to resemble the plaintiff's. In *Glenny vs. Smith*, 2 Drew & S. 476, defendant had been in plaintiff's employ, and started in business on his own account. Over his shop he had his own name, Frank P. Smith, printed in large, black letters on a white ground, but on the brass plates in the windows of his shop he had engraved the word "from," in small letters, and the words "Thrasher & Glenny" (the name of plaintiff's firm) in large letters. He had an awning, also, in front of his shop, which, when let down, would cover his own name, and expose only the name of plaintiff's firm. The court held that defendant was deceiving the public, and an injunction was issued. *Croft vs. Day*, 7 Beav. 84; *Levy vs. Walker*, 10 Ch. Div. 438; *Turton vs. Turton*, 42 Ch. Div. 128; *Hookham vs. Pottage*, L. R. 8 Ch. App. 91; *Meneely vs. Meneely*, 62 N. Y. 431; *Fullwood vs. Fullwood*, 9 Ch. Div. 176.

6. That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade name, or a trade mark, the courts will enjoin the continued violation of such agreement. In *Grow vs. Seligman*, 47 Mich. 607, 11 N. W. Rep. 404, defendant had carried on the clothing business at Bay City, under the name and style of "Little Jake," and sold out to complainant, and expressly conveyed the right to use the name and style of "Little Jake," and agreed that he would not again engage in that business at Bay City, and defendant was enjoined from violating his agreement. In *Shackle vs. Baker*, 14 Ves. 468, defendant agreed that he would not, for the space of 10 years, carry on or permit any other person to carry on the same business in Middlesex, London, or Westminster, and that he would use his best endeavors to assist plaintiff, and procure customers for him. In *Hitchcock vs. Coker*, 6 Adol. & E. 438, Coker had agreed to enter the services of the plaintiff, and that he would not at any time thereafter engage in the business in which his employer was engaged. To the same effect are *Beal vs. Chase*, 31 Mich. 490; *Doty vs. Martin*, 32 Mich. 462; *Burckhardt vs. Burckhardt*, 36 Ohio St. 261; *Vernon vs. Hallam*, 34 Ch. Div. 752; *Tode vs. Gross*, 127 N. Y. 480, 28 N. E. Rep. 469.

7. That an assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious

name in which such business has been carried on, and such trade marks and trade names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it. Courts have uniformly held that a trade mark has no separate existence; that there is no property in words, as detached from the thing to which they are applied; and that a conveyance of the thing to which it is attached carries with it the name. *Dixon Co. vs. Guggenheim*, 2 Brewst. 321; *Lockwood vs. Bostwick*, 2 Daly 521; *Deringer vs. Plate*, 29 Cal. 292. In *Gage vs. Publishing Co.*, 11 Ont. App. 402, Gage and Beatty were copartners, and, among other things, were engaged in publishing "Beatty's Headline Copy Books." Beatty sold out to Gage all his interest in the business, and engaged in the drug business. Gage continued for some years the sale of the copy books, when Beatty licensed defendant to publish "Beatty's New and Improved Headline Copy Books." In *Hoxie vs. Chaney*, 143 Mass. 592, 10 N. E. Rep. 713, Hoxie and Chaney were copartners, engaged in the manufacture of soaps, two brands of which were known as "Hoxie's Mineral Soap" and "Hoxie's Pumice Soap." These were simply trade names, by which the articles were known, and the right to use them passed with the right to manufacture the articles. In *Cement Co. vs. Le Page*, 147 Mass. 206, 17 N. E. Rep. 304, Brooks and Le Page, as copartners, sold to plaintiff the good will of their business, and the right to use their trade marks. They were engaged in the manufacture of glues. Their light glues they named "Le Page's Liquid Glues." The court held that the right to use the name by which the articles were known to the trade passed with the right to manufacture the articles. In *Merry vs. Hoopes*, 111 N. Y. 415, 18 N. E. Rep. 714, the parties were formerly partners. Hoopes sold to Merry, but afterwards undertook to use, certain trade marks, viz., the "Lion Brand and "Phœnix Brand," but the court held that these trade marks passed to the assignee. In *Hall vs. Barrows*, 4 De Gex, J. & S. 150, the firm had marked the chief part of their output of iron with the initial letters of their partnership name, "B., B. & H.," surmounted by a crown, and the court held the letters and crown had become a trade mark, and, as such, should be included as a subject of value. *Brown Trade Marks*, 358; *Millington vs. Fox*, 3 Mylne & C. 338-352; *Myers vs. Buggy Co.*, 54 Mich. 215, 19 N. W. Rep. 961, and 20

N. W. Rep. 545; *Sohier vs. Johnson*, 111 Mass. 242; *Shipwright vs. Clements*, 19 Wkly Rep. 599; *Rogers vs. Taintor*, 97 Mass. 291.

8. A corporate name is regarded as in the nature of a trade mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the organization of corporations usually prohibit the adoption of the same name by two companies. *Holmes vs. Manufacturing Co.*, 37 Conn. 278.

These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good will. Complainants insist, however, that a grant of good will may be implied, and, when express or implied, it imposes certain restraints upon the vendors, viz.: (1) That they cannot afterwards personally solicit customers of the old firm, and (2) that they are restricted in the use that may be made of their own names.

I. The doctrine that a retiring partner who has conveyed his interest in an established business, whether the good will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting investment, or invested but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation, or service; nor does he guaranty the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property

and location, rather than those which attach to the person of the vendor. T. Pars. Partn. 409. He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities, not assurances. It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold, but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality—next door, if you please—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to again engage in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the personal solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so agreed, there is no restraint upon that right. In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade, nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to again engage in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition made to complainants was not only to sell but to buy. In *Ginesi vs. Cooper*, 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the public, and the case is without support in that respect. In *Labouchere vs. Dawson*, L. R. 13 Eq. 322, the court say that a retiring partner who sells the good-will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business; but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the

old firm. But in *Pearson vs. Pearson*, 27 Ch. Div. 145, *Labouchere vs. Dawson* is expressly overruled. The court say: "The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of good will. I think that there was, taking good-will as defined by Lord ELDON in *Cruttwell vs. Lye*, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good will as defined by Lord ELDON. But the term 'good will' is not used; and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of the sale of 'good-will.' It does not, *per se*, prevent the vendor from carrying on the same class of business." *Vernon vs. Hallam*, 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good-will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros. (the name of the business which he had sold), is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and the injunction was granted to restrain a breach of that covenant. The court say: "Where a vendor sells his business, and commences a similar business in the same locality, and solicits customers of the old house to deal with him, the court, following the decision in *Pearson vs. Pearson*, and being of the opinion that the case of *Labouchere vs. Dawson* had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation." *Leggott vs. Barrett*, 15 Ch. Div. 306, *Ginesi vs. Cooper*, 14 Ch. Div. 596, and a number of other cases cited, follow *Labouchere vs. Dawson*.

The correct rule is, we think, laid down in *Cottrell vs. Manufacturing Co.*, 54 Conn. 138, 6 Atl. Rep. 791. The court say: "Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacture of printing-presses. By purchasing the good-will merely Cottrell secured the right

to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good will to establish a like business at the next door, and by the potential instrumentalities of the newspapers and general circulars ask old customers to buy at the new place, and withhold from him only the instrumentality of highest power, viz., personal solicitation. To deny him the use of the newspapers and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these; and in some cases, the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not

upon inference to bar him from trade, either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law."

Good will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. Where it consists of the advantages of location, it follows an assignment of the lease of that location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. A partnership name may become impersonal, after the death of the partners, and it is then treated like a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of manufacturing such article; and where the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive. It appears, however, that in the first bill of sale which was prepared the words, "including the good-will attendant upon said business," were inserted, but were objected to, stricken out, and a new bill of sale prepared, omitting any reference to good will. But it is said that this clause was objected to because, in the opinion of the objector, it might preclude him from engaging in the same business, whereas, under the law, he would have such a right had the clause remained. The only use, however, which complainants now propose to make of the clause, treated as a part of the instrument, is to restrict that right to engage in business by taking away one of its incidents. Adopting the language used in *Churton vs. Douglas*, Johns. Eng. Ch. 174, with reference to the right of plaintiff to continue the use of the old firm name, "I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. I think, therefore, that this case goes a step higher than the authorities, and the defendant is entitled to put his case in the highest possible form with regard to his right" to engage in the same line of business

II. The next question relates to the use by defendants of the firm name of Farrand, Williams & Clark. It is clear that complainants have no right to continue their business under the old firm name. The rule that upon a dissolution of a firm neither partner has the right to use the firm name, as well as the other rule that a retiring partner has no right to use the old firm name, are both subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. In case A B should sell out his business to C D, in the absence of a grant to C D of the right to use the name of A B, or an agreement to the contrary, is there any doubt but that A B would have the right to engage in the same line of business in his own name? In that case, such a probability would naturally suggest itself to C D, and, if he desired to get the advantage of A B's abstinence from business, he would insist upon an agreement to that effect. In the present case, Mr. Farrand's name had been at the head of the firm name for nearly half a century and the name of another of the retiring members corresponded with the only other surname used in the old firm name. It must have been evident to complainants that in any event the name of the new firm would be similar to that of the old firm. If complainants desired any protection against such a use of the names of the retiring members, they should have inserted a provision to that effect in the bill of sale. The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement. Here neither have been purchased. Complainants have purchased the business of the old firm. They have the right to advertise themselves as succeeding to and continuing that business. The exercise of such a right does not conflict with any right reserved by defendants. Complainants, by such a holding out, commit no fraud, misrepresentation, or deception. They publish the truth only. Defendants have the right to use their own names, or any collocation of their own names. They have not adopted the old firm name, although it would have been appropriate. They have adopted no fictitious name. There is no deception in the use of the name adopted by them. The business of the old firm is a separate and distinct business. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the

rule already laid down, that no man has the right to sell or advertise his own goods or business as that of another, and so mislead the public and injure such other person. In *Lathrop vs. Lathrop*, 47 How. Pr. 532, after dissolution J. Lathrop formed a copartnership with one Tisdale, and adopted the name of J. Lathrop & Co., which was the style of the old firm. Held that, in the absence of any covenant with his late partner, he might legally do so. In *Reeves vs. Denicke*, 12 Abb. Pr. (N. S.) 92, the court say: "In this case, the firm name was not sold or transferred to defendants as constituting a part of the partnership property; nor did the sale, in terms or by necessary implication, include the good will; and it is therefore unnecessary to determine whether the partnership name was a part of such good will. There was no restraint upon a retiring partner holding him from engaging in a similiar business, and he violated no obligation by forming a new firm under his own name, and transacting a business in all respects like that he had released to them. It is quite clear that defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass and become a part of defendant's new firm, it should have been provided for in the conveyance. That it was not intended it should pass is evident from the omission to include it." *Seed Co. vs. Dorr*, 70 Iowa 481, 30 N. W. Rep. 866; *Bassett vs. Percival*, 5 Allen 345; *Machine Co. vs. McGowan*, 22 Ohio St. 370. In *Turton vs. Turton*, 42 Ch. Div. 128, although there were no contract relations between the parties, the court say: "No man can have the right to represent his goods as the goods of another; therefore, if a man uses his own name, that is no *prima facie* case, but if he, besides using his own name, does other things which show that he is intending to represent, and is in point of fact making his goods represent, the goods of another, then he is to be prohibited; but not otherwise." In *Hookham vs. Pottage*, L. R. 8 Ch. App. 91, plaintiff and defendant had been copartners as Hookham & Pottage. Plaintiff succeeded to the business, and defendant afterwards set up a shop only a few doors away, and printed over the door the words, "Pottage, from Hookham & Pottage." The court held that "defendant had a right to state that he was formerly manager, and afterwards a partner, in the firm of Hookham & Pottage, and that he had a right to avail himself by the state-

ment of that fact of the reputation which he had so acquired, but that he had no right to make that statement, or to avail himself of that reputation, in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookham & Pottage, or that Hookham had any interest in it." In *Meneely vs. Meneely*, 62 N. Y. 431, the court say: "If defendants were using the name with the intention of holding themselves out as the successors of Andrew Meenely, and as the proprietors of the old established foundry which was being conducted by plaintiffs, and thus enticing away customers, and if with that intention they used the name in a such a way as to make it appear that of the plaintiff's firm, or resorted to any artifice to induce the belief that defendants' establishment was the same as that of plaintiffs, and, perhaps if without any fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishment, and produce injury beyond that which resulted from similarity in name, then the court would enjoin them, not from the use of the name, but from using it in such a way as would deceive the public. * * * Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another, bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead." In *Fullwood vs. Fullwood*, 9 Ch. Div. 176, R. J. Fullwood carried on business as manufacturer of annatto at 24 Somerset place, Hoxton, from 1785 to 1832. Plaintiff and three brothers, one of whom was the defendant, succeeded to the business, but ultimately the right to carry on the business vested in the plaintiff. Defendants, Mathew Fullwood, and another brother formed a copartnership in the name of E. Fullwood & Co., and issued and distributed in various ways cards containing the following: "Established over 85 years. E. Fullwood & Co. (late of Somerset place, Hoxton). Original Manufacturers of Liquid and Cake Annatto." They also placed around the bottles containing the annatto a wrapper resembling that which plaintiff used. The court say: "Defendants are entitled to carry on their business under the firm name which they have adopted, if they are so minded, provided they do not represent themselves to be carrying on the

business which has descended to plaintiff." In *Bininger vs. Clark*, 60 Barb. 113, the defendant wrongfully advertised himself as successor to the old firm, and made such a use of his own name as to indicate a fraudulent intent. *Hegeman vs. Hegeman*, 8 Daly 1; *Levy vs. Walker*, 10 Ch. Div. 436. In *Churton vs. Douglas*, Johns. Eng. Ch. 174, 5 Jur. (N. S.) 887, plaintiff and defendant had carried on the business as stuff manufacturers at Bradford, in a building owned by defendant, and known as "Hall Ings," under the name and style of John Douglas & Co. Defendant sold out to plaintiff all his share, right, and title in the business, including the good will, and executed to plaintiff a seven-years lease of the premises occupied by the firm. Within a short period defendant set up in the same line of business, next door to plaintiff, in a part of the same building, known as "Hall Ings," adopting the old firm name of John Douglas & Co. The court held that defendant, by the use of the old firm name, and the surroundings, would be obtaining the custom of the old firm, by inducing the belief that his was a continuation of the old establishment. The court say: "The authorities, I think, are conclusive upon this point that the mere expression of parting with or selling the good will, does not imply a contract on the part of the person parting with that good will not to set up again in a similar business; but I use the expression 'similar' to avoid including the case of the vendor seeking to carry on the identical business. He does not contract that he will not carry on an exactly similar business, with all the advantage which he might acquire from his industry and labor, and from the regard people may have for him, and that in a place next door, if you like, to the very place where the former business was carried on. It is settled that it is the fault of those who wish any protection against such a class that they do not take care to insert the provision to that effect in the deed."

The same principle obtains with reference to trade marks. One may have a right in his own name as a trade mark, but he cannot have such a right as against another person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. *Sykes vs. Sykes*, 3 Barn. & C. 541; *Holloway vs. Holloway*, 13 Beav. 209; *Rogers vs. Taintor*, 97 Mass. 291; *Gilman vs. Hunnewell*, 122 Mass. 139;

*Goodyear's India Rubber Glove Manuf'g Co. vs. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 166. The tests applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations, so as to convey the impression that the business is a continuation of the old business? Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employés, or newspaper reporters. In *Meneely vs. Meneely*, the court say: "Where the only confusion created is that which results from the similarity of names, the court will not interfere." In *Turton vs. Turton* it is said that "defendants are not responsible for the blunders made by the business community in not distinguishing between John Turton & Sons and Thomas Turton & Sons." See, also, *Richardson & Boynton Co. vs. Richardson & Morgan Co.*, 8 N. Y. Supp. 52; *Goodyear's India Rubber Glove Manuf'g Co. vs. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166.

Any collocation of the names of Farrand and Williams would create some confusion. Defendant Clark had been connected with the old business for thirty years, and Williams, the son-in-law of Mr. Farrand, for twenty-one years. Defendants are using their own names only. They went into business on Woodward avenue, several blocks from the old stand. In every letter-head, bill-head, card, or advertisement in which their firm name appears they give the individual names of the members of the firm, the new place of business, and in no case have they represented that they are successors to the old firm. The bill-heads used by the old firm had a cut of the old stand on the left-hand upper corner, about three inches square. Those of the new firm contain no cut, and less than half of the amount of matter. It would be exceedingly difficult to prepare two bill-heads more unlike. The letter-heads of the old firm contained two cuts,—one of the old stand, at the left hand, and one of the Peninsular White Lead & Color Works, on the right. The dissimilarity is marked. The envelopes used by the old firm contain eight printed lines on the upper left-hand corner, occupying an inch and three-quarters of space. Those used by the new firm contain five lines, occupying about three-quarters of an inch in space. There has been no attempt at imitation in words or type. On March 15th

they announced, through circulars distributed generally, that they had engaged in business at 32 and 34 Woodward avenue; that they expected to have their new store ready for occupancy in a few days; and that the work of getting a new stock of goods would be pushed as fast as possible.. On April 7th they issued another circular, announcing that they were now prepared to fill orders, and hoping that the friendly acquaintance of many years would be continued. An advertisement is produced, wherein defendants say: "Though it may seem paradoxical, it is nevertheless true, that the wholesale drug-house of Farrand, Williams & Clark is both the oldest and the newest representative of this important commercial industry in Detroit." But in the same advertisement they announce the dissolution of the old firm, their retirement from said firm, and the formation and business location of the new firm. It is difficult to imagine how such an advertisement would mislead the public. It contains no false colors. Both parties advertised extensively in the city and State papers and in the trade journals; complainants giving the names of their individual members, and their new firm name, and advertising themselves as the successors to Farrand, Williams & Co.; and defendants giving the names of their individual members, and the name and business location of the new firm. Complainants sent out circulars to the trade generally, informing it of the dissolution of the old firm, the fact that they were the successors, and giving their firm name; and defendants sent out circulars announcing their withdrawal and the formation of a new firm. There is no doubt but that the dissolution of this firm, the fact that complainants had bought out the interests of defendants, the name adopted by complainants, the formation of the new firm, the names of its members, and the defendants' firm name, have been most extensively advertised by both parties, not only in the city, but throughout the State and Union. Nearly fifty letter have been received by the old firm, since the dissolution, addressed to Farrand & Williams; Farrand & Williams Paint Co.; Farrand & Williams Drug Co.; Farrand, Sheley & Brooks; Farrand, Williams & Sheley; Farrand, Williams, Sheley & Co.; Farrand, Williams & Brooks; Farrand & Co.; Williams, Farrand & Co.; Farrand, Sheley & Brooks; Williams & Farrand; Williams, Farrand & Co.; and Williams & Co. It cannot be said that any act of defendants

is responsible for these blunders. Confusion is inseparable from the dissolution of an old firm and the composition of two firms from its membership, especially when the name of but one of those who remained has appeared in the firm name, and the new firm is composed of one whose name for nearly half a century has stood at the head of the firm name, and the surname of another retiring member is the same as the only other name used in the old firm name. It appears that at the outset defendant Clark, by mistake opened two or three letters addressed "Farrand, Williams & Co.," but in every other instance defendants refused to receive mail directed to Farrand, Williams & Co., unless directed to defendants' street and number; that in a single instance Clark inadvertently signed a letter "Farrand, Williams & Co.;" that two checks were sent to defendants in payment for goods bought from them, which were payable to the order of Farrand, Williams & Co., and Mr. Farrand indorsed them Farrand, Williams & Co., and guaranteed the indorsement; that in four instances merchandise or articles not marked, but intended for defendants, were delivered to complainants, and afterwards taken away; that in two instances complainants were notified by freight agents that freight awaited delivery; that in both the goods were manifested to Farrand, Williams & Co., but marked, and were afterwards delivered, to Farrand, Williams & Clark, for whom they were intended; that complainants were notified that a sample box of glassware had been shipped to them, but they had not received it; that defendants received a sample box of glassware from the same house, which was billed to Farrand, Williams & Clark, and the latter were notified of the shipment by the assignors; that similar boxes of samples had been sent to other drug-houses at Detroit; that in one or two instances merchandise had been delivered to defendants which was intended for complainants; that in a single instance a customer at Port Huron, who knew of the dissolution, intending to call up the old house by telephone, asked for Farrand & Williams, was given Farrand, Williams & Clark, and told that it was Farrand, Williams & Clark, asked the price of oil, and ordered one barrel; that 112 letters, telegrams, receipts, or bills were received by complainants directed to Farrand, Williams & Co., which were intended for defendants; that of these thirty-five were directed on the inside to Farrand, Williams & Clark; that

all of the letters so received were from business houses from which defendants were buying goods, and none were from customers of either house. These proofs do not tend to show any appropriation by defendants of the old firm name, or any attempt to secure the correspondence addressed to the old firm, or that the customers have been deceived or misled, or that defendants have practiced any fraud, concealment, or deception.

Complaint is made in the bill that defendants have enticed away certain of complainants' salesmen, but this charge is not made out by the proofs. It is also charged that defendants have simulated certain trade marks and labels used by the old firm, but no instance of piracy has been established. Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade marks as were in use by the old firm, and defendants have no right to so imitate the labels in use by the old firm as to convey the belief that the goods labeled are from the old house. The use, however, of the words, "Sold by Farrand, Williams & Co.," or "Prepared by Farrand, Williams & Co.," upon a label, will not be protected as a trade mark or trade-name, and the right to use that name in that connection did not pass under the bill of sale. The decree of the court below must be affirmed as of February 27, 1891, and the bill dismissed, with costs to defendants.

MORSE and GRANT, JJ., concurred with MCGRATH, J.

LONG, J., did not sit.

CHAMPLIN, C. J. *dissented.*

NOTE.—For other cases, see Mechem's Elem. of Partn., §§ 86, 87, 88, 89.

Compare also with the two cases following.

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## SNYDER MANUFACTURING CO. vs. SNYDER.

*Supreme Court of Ohio, 1896.*

54 Ohio St. 86, 43 N. E. Rep. 325, 31 L. R. A. 657.

The action below was brought by Andrew G. Snyder and William A. Snyder, against the Snyder Manufacturing Com-

pany, to enjoin the use by the defendant of the name "Snyder Manufacturing Company," and especially the use of the word "Snyder" in that name. The plaintiffs, who are now, and for several years past have been, engaged in business as manufacturers of certain kinds of goods at the city of Piqua, in this state, for many years before carried on the same kind of a business at Ashtabula, also in this state, and by their skill and attention to business established a valuable reputation in their business, which was carried on under the name of Snyder & Son. Then, on the 7th day of September, 1887, they and two other persons formed a copartnership with W. H. Bradley, who was the owner of a manufactory at Ashtabula, employed in the manufacture of goods similar to those made by the plaintiffs, for the purpose of combining the business of the parties, and thereafter continuing the same as one concern. By the terms of the partnership agreement, Bradley was to, and did, contribute one-half of the capital, and, in addition thereto, furnish the use of his manufactory without charge, and expend at least $3,000 in putting the same in repair, as an offset to which the plaintiffs were to, and did, put in the good will of their business, and they and their two associates were to, and did, contribute the other half of the capital, and devote their time and skill to the manufacture of goods and the general management of the business of the partnership; Bradley not being required to give any time or attention thereto. This copartnership, which carried on its business under the firm name of Snyder Manufacturing Company, continued for a period of three years, acquiring under that name an extensive and profitable business, and a good reputation; and at its termination, the parties being unable to effect a satisfactory settlement, the plaintiffs, to obtain a settlement of its affairs, commenced an action, in which a receiver was appointed at their instance, who took possession of the partnership effects, and afterwards, under an order of the court so directing him, sold the same, with the good will of the firm, at public sale. The order of sale contained an express provision that the purchaser should have the right to carry on the business as the successor of the firm, and was so made without objection from any of the partners, all of whom were parties to the action. The plaintiffs and Bradley were competing bidders at the sale, when the latter, bidding more than his com-

petitors for the assets and good will of the firm, and being the highest bidder therefor, became the purchaser. The sale was duly confirmed by the court, and the property transferred to Bradley, who shortly thereafter, with other persons, organized a corporation under the laws of this state, with the name of the "Snyder Manufacturing Company," for the purpose of continuing the business at the manufactory which had been operated by the firm; and the partnership effects and good will that Bradley had purchased were transferred, with the manufacturing plant, to the corporation, which has since, in its corporate name, been doing business of like character to that formerly done by the copartnership, and claiming to be its successor. That manner of conducting its business by the corporation was enjoined by the judgment which it is sought here to have reversed; and whether there should be a reversal or not, it is conceded, depends on the effect of Bradley's purchase of the assets, including the good-will of the partnership, and their transfer by him to the defendant corporation. Did the defendant in that way acquire the right to carry on a business in the name adopted by it, like that which had been done by the previously existing partnership, and as its successor?

*Burke & Ingersoll* and *A. A. Thayer*, for plaintiff in error.

*Theodore Hall* and *Dickey, Carr & Goff*, for defendants in error.

WILLIAMS, J. (after stating the facts.) Without attempting an accurate or exhaustive definition of the good will of a business, it may be said that it practically consists of that favorable disposition or inclination of persons to extend their patronage to the business on account of the reputation it has established; and, as the business is always associated with the name under which it is conducted, the name becomes a part, and often an important part, of its good will. The good will of a copartnership is regarded in law as property, constituting a part of its assets, and having a salable value in connection with its tangible property, sometimes exceeding all its other assets, because of the advantages afforded a purchaser of retaining an established custom, and enlarging it. As a general rule, when it become necessary to sell the partnership effects, the good will should be valued and sold

with, and as a part of, them, and ordinarily it passes by a sale of them, though not expressly mentioned. It is well settled that, when a partner sells his interest in the business to a copartner, without a reservation or exception of the good will, the purchaser is entitled, not only to continue the business in the name of the firm, and as its successor, but he may prevent the selling partner or other person from carrying on business in that way; and no good reason is apparent why the same result should not attend a purchase of the entire assets and good will of the firm, by one of the partners, at a sale thereof, made under an order of court, in a proceeding to which the partners were parties, especially if the sale be so made at their instance and for their benefit. Indeed, the authorities appear to go further, and maintain that, upon the dissolution of a copartnership, there being no agreement between its members to the contrary, the court, having the parties before it, may order the good will to be sold or disposed of as may be deemed most advantageous to the partners; and that the purchaser at such sale, though a stranger to the firm, may lawfully continue the use of the firm name in carrying on the business thereafter. And that seems but the logical result of the rule that the rights mentioned belong to a partner who becomes a purchaser at such sale; for, in order to insure a fair sale, all bidders should stand upon an equality, which would not be so if the rights acquired at the sale were to be varied or made to depend upon the relation which the purchaser had sustained to the partnership, or other individual circumstance. The salable value of the good will is whatever it is worth in the market when open to untrammeled competition; and when brought to that test for the benefit of the partners, it is not for them to assert that the purchaser obtained less than they authorized to be sold or induced him to believe he was buying.

It is contended that Bradley did not become the owner of the good will of the late firm of which he was a member, by his purchase at the receiver's sale, because (1) the good will of the plaintiffs was put into the firm as an offset to the use of Bradley's manufactory, and only for the period agreed upon for the duration of the partnership, and therefore, at the expiration of that period, the plaintiffs were reinvested with their good will, as was Bradley with the possession of his property; (2) the order of the court under which the sale was made

expressly excludes any right on the part of the purchaser to make use of the firm name; and (3) the good will ceased upon the termination of the partnership, and consequently could not be sold.

1. With respect to the first of these propositions, it may be observed that what the order of the court directed to be sold, and what the receiver, under its authority, in fact sold, was, not the good will or property of the plaintiffs, but those belonging to the firm. The plaintiffs' business and its good will, as they existed at the formation of the partnership, were absorbed and merged into those of the firm, and went to make up its assets, and, in so far as they did so, became the property of the firm, subject to sale under the order with its other effects, and with them vested in the purchaser. Conceding, however, that the plaintiffs, at the expiration of the partnership into which they had entered with Bradley, were restored to the good will which belonged to their business when the partnership was formed, and were entitled to resume that business under the name they had formerly used, it is not perceived how that could operate to vest in them any part of the good will of the firm, or prevent its vesting in Bradley under the receiver's sale.

2. The order under which the sale was made, directs the receiver to sell all of the property of the firm "as a whole, including the good will," and provides that "the purchaser shall have the right to carry on the business as successor to the Snyder Manufacturing Company," but states that "the court does not pass upon or make any order whatever as to what name said purchaser would have the right to use in carrying on said business." The last clause of the order is relied upon as excluding any right, on the part of the purchaser under it, to employ the name of the firm in any business he might choose to carry on after the purchase, and as further excluding any authority to do such business as the successor of the firm. But it is obvious the clause has not that operation. Instead of being an adjudication abridging the rights of the purchaser with regard to the use of the firm name, its design was to leave the determination of those rights, in any controversy that might thereafter arise concerning them, unaffected by the order. And, as a partner who purchases the property and good will of the copartnership becomes entitled to the use

of the firm name, in the absence of a stipulation forbidding it, an express provision in the sale, or the order of the court under which it was made, that the purchaser should have that right, was unnecessary.

3. The proposition mainly urged in support of the judgment below is that the good will of a copartnership can exist only so long as it is a going concern, and, ceasing upon the termination of the partnership, is not thereafter a subject of sale. It may be that, when a firm is dissolved, its effects distributed, or sold in parcels to purchasers not wishing to embark in a similar business, and its affairs are wound up, its good will is dissipated and lost; but that results from the acts of the partners themselves in making such a disposition of the assets as renders the good will unavailable as a salable article, for it is not a distinctive article of property, which may be sold separate from the tangible effects of the partnership, and in that sense it may be said to cease when the partnership is so wound up. That, in substance, is the scope and purport of the rule declared in the cases cited in the brief of the defendant in error. In neither of the cases was the question here presented involved. But the doctrine maintained, both in England and this country, where the copartnership is wound up in the manner indicated, is that the good will remains the undivided property of the members of the firm, either or any of whom may thereafter lawfully use the firm name if they desire to continue in business, although the name of the partner so using it does not appear in that of the firm. *Banks vs. Gibson*, 34 Beav. 566; *Bradbury vs. Dickens*, 27 Beav. 53; *Caswell vs. Hazard*, 121 N. Y. 484, 24 N. E. Rep. 707; *Dougherty vs. Van Nostrand*, Hoff. Ch. 58. The proposition contended for, if sustained, would practically destroy the value of the good will as an asset of the partnership, and entail upon its members, in many instances, serious loss. As partnerships rest upon the agreement of the parties, express or implied, a dissolution occurs, and a new partnership is formed, whenever a partner retires or a new one is admitted; and if, when that occurs, the good will of the dissolved firm should cease, and could neither be acquired by the new firm nor transferred by any sale made by the members of the old one, though expressly included in the sale of its effects, its value as an asset of the firm would disappear. Yet, it is commonly known that the good will constitutes an important, and sometimes a controlling, part of the

consideration for the purchase, and it has long been the settled law, that, in cases of the kind mentioned, the purchaser obtains the good will, including the right to the use of the firm name in the continued prosecution of the business. In so holding, the courts give effect to the intention of the parties as disclosed by the transaction. Where the partners themselves make a sale of the firm effects, including the good will, the intention and understanding is manifest that the purchaser shall acquire and enjoy every advantage and benefit which the firm had, so far as the parties are capable of transferring the same; and, when a sale is made under an order of court, in a proceeding to which the partners are parties, that intention is not less plainly inferable. The object to be accomplished in making the sale, in either mode, of the good will, with the other partnership effects, is to enhance the value of the assets by inducing persons to bid more for them than they otherwise would, under the belief that the purchaser will obtain all the benefits of the good will; and, when the sale is made and consummated on that basis, it would be neither just nor equitable to permit the vendors to deprive the purchaser of anything they undertook to sell, and for which they have been paid. The good will being thus sold as a thing of value, and paid for by the purchaser as such, to deny him the benefit of it would operate as a fraud, which the law will not sanction.

We are not reluctant, therefore, in holding that, upon the dissolution of a trading copartnership, its assets, including the good will of the business, may be sold as a whole, either by the partners directly, or through a receiver, under an order made by a court in a case to which they are parties; and that a purchaser thereof under either method of sale is entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose; and, further, that, where the purchaser transfers the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, it may carry on the business, in the same manner, under a corporate name including the name which had been used by the firm. *Iron Works Co. vs. Payne*, 50 Ohio St. 115, 33 N. E. Rep. 88, 19 L. R. A. 82. If it is desired to limit the right of the purchaser or his vendee in the use of the firm name, or exclude such right altogether, it should be done by stipulation in the contract when the sale is made by the partners, or by a provision to that effect in the order, when the

sale is made through the court. In the case of *Horton Manufacturing Co. vs. Horton Manufacturing Co.*, 18 Fed. Rep. 816, cited by counsel for the defendant in error, a copartnership, without any consideration, obtained the consent of a person not a member to use his name in, and as part of, the firm name. That consent, the court held, amounted to a mere license, revocable at pleasure, and the partnership so obtaining it could not, without the consent of such person, "transfer the right to another company or corporation to make a like use of the name." But that case cannot be regarded as an authority against the claim made by the plaintiff in error in this case; for, where the partners themselves make a sale of their firm's good will, which carries with it the right to use the firm name, or authorize such sale to be made, it cannot be said that the use of the name, either by the purchaser, or those succeeding to the business, is without their consent. As said by the court in the case just cited, on page 819: "If one has made of his own name a trade mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred."

Upon the facts admitted by the pleadings, the judgment of the circuit court must be reversed, and judgment rendered for the plaintiff in error.

Judgment accordingly.

NOTE.—See Mechem's Elem. of Partn., §§ 86, 87, 88, 89. Compare also with preceding and following cases.

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## TREGO vs. HUNT.

*English House of Lords, 1895.*

[1896] A. C. 7.

For some years prior to 1876 William Henry Trego, the husband of the appellant, Anna Trego, had carried on business as a varnish and japan manufacturer at Bow and in London, under the name of Tabor, Trego & Co. In 1876 he took the respondent into partnership, but upon the terms that the good

will of the business should be and remain the sole property of William Henry Trego. The partnership continued until his death, in 1888. In February, 1889, a partnership agreement was made between the appellants and the respondent that they should carry on the business under the old style of Tabor, Trego & Co., for a term of seven years, computed from January 1, 1889. The agreement provided that the good will should nevertheless be and remain the sole property of Anna Trego. In December, 1894, the appellants found that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. The respondent admitted that his object in having the list made was to acquire information which would enable him, when the partnership expired, to canvass these persons, and to endeavor to obtain their custom for himself. The appellants accordingly brought this action, and moved for an injunction to restrain the respondent from making any copy of or extract from the partnership books for any purpose other than the purpose of the partnership business.

STIRLING, J. made no order, and this decision was affirmed by the court of appeal. (Lord HALSBURY, LINDLEY and A. L. SMITH, L. J.J.) [1895] 1 Ch., 462.

*Hastings*, Q. C., and *Cozens—Hardy*, Q. C. (*Leigh Clare*, with them), for the appellants.

*Sir R. E. Webster*, Q. C., and *Buckley*, Q. C. (*George Henderson* with them.)

Lord HERSCHELL. My Lords, a very important question which has given rise to much difference of judicial opinion presents itself for decision in the present case. [His lordship stated the facts set forth above, and continued:]

STIRLING, J., in the course of his judgment said: "It has been admitted in the argument, and for the purposes of it, that the defendant intends, in the event of the partnership coming to an end at the beginning of next year, to use this list for the purpose of soliciting the customers of the present firm. He proposes then to engage in a business of a similar nature to that carried on by the firm, and the question which I have to decide is whether he is entitled to make such a use of the list."

It seems clear, therefore, that the point in contest before

the learned judge who heard this motion was whether the respondent was entitled to make use of the list of the customers of the firm which he had obtained in order to canvass them when he started business on his own account. I mention this because it may have been open to contention on behalf of the respondent that he was at all events entitled, whilst he remained a partner, to make copies of the partnership books, and that it was premature to come to the court to restrain the use of these copies even if he were not entitled when he ceased to be a partner to canvass the customers of the firm; but in view of the fact that the respondent threatened to use the list for the purpose of canvassing the persons named therein, and having regard to the course taken before the learned judge, I think it would have been open to him to grant an injunction, though not in the terms prayed for, if the canvassing of these customers would be a wrongful act on the part of the respondent.

STIRLING, J., and the court of appeals had, I think, no alternative but to refuse to grant any injunction. They were bound by the decision of the court of appeal in the case of *Pearson vs. Pearson*, 27 Ch. D. 145, that, even though the good will belongs to one of the partners, it is lawful for the other, on the termination of the partnership, to canvass the customers of the firm. Consistently with that decision, I think it would have been impossible to hold that the appellants were entitled to an injunction. That case is, however, open to review by your lordships, and the real question in the present case is whether it was well decided.

The question whether a person who had sold the good will of his business was entitled afterwards to canvass the customers of that business came first before the courts for decision in the case of *Labouchere vs. Dawson*, L. R. 13 Eq. 322. Lord ROMILLY, M. R., answered in the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveler, to go to anyone who was a customer of the firm and to solicit him not to continue business with the old firm but to transfer it to him; that this was not a fair and reasonable thing to do after he had sold the good will. He accordingly granted an injunction to restrain

the defendant, his partners, servants, or agents from applying to any person who was a customer of the old firm prior to the date of the sale, privately, by letter, personally or by a traveler, asking such customers to continue to deal with the defendant or not to deal with the plaintiffs.

In the case of *Ginesi vs. Cooper*, 14 Ch. D. 596, Sir George JESSEL, M. R., followed the decision in *Labouchere vs. Dawson*, L. R. 13 Eq. 322, and expressed in very strong terms his concurrence with it. He granted an injunction restraining the defendants, their clerks, servants, agents, workmen, or others, from soliciting or in any way endeavoring to obtain the custom of or orders for goods similar in character to those dealt in by the old firm from such of the customers as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff. This was all that the plaintiff in that case asked for; but the learned judge went further, and expressed a strong opinion that a man who sold the good will of his business must not only refrain from soliciting the old customers to deal with him, but must not deal with them. It was not, he said, necessary to decide it on that occasion; but he stated it because he thought what the meaning of selling the good will of a trade or business is should be thoroughly understood.

In the case of *Leggott vs. Barrett*, 15 Ch. D. 306, which came before the same learned judge shortly afterwards, he acted upon the same view, and extended the injunction to restrain the defendant from dealing with the customers of the old firm. From this judgment there was an appeal; but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. He made no objection to the injunction so far as it restrained him from canvassing those customers. The court of appeal dissolved that part of the injunction of which the appellant complained. They thought they could not on any just principle prevent the defendant from supplying a man with goods if he applied for them; that there was no implied obligation upon him, either legal or moral, to shut his door against a customer who came to him of his own free will; that a sale of good will did not involve an implied contract not to deal with any customers of the old business the good will of which was sold. The case is chiefly important for present purposes, in so far as it dis-

closes the view taken by the learned judges, who, on that occasion, constituted the court of appeal, on the point now under consideration.

In the case of *Pearson vs. Pearson*, 27 Ch. D. 145 to which I shall have occasion to refer immediately, COTTON, L. J., stated that the decision in *Labouchere vs. Dawson*, L. R. 13 Eq. 322, was doubted in *Leggott vs Barrett*, 15 Ch. D. 306, by JAMES, L. J., and himself. This is no doubt correct so far as COTTON, L. J., is concerned; but I am unable to find any clear indication that this was the view of JAMES, L. J. It is quite true that in an early part of his judgment he said: "I do not like going much into the case, because what I should say might perhaps be considered to mean that the injunction which is submitted to is too wide." But in a later part of the judgment he says: "At first it did not appear to me that we might, from the equitable view of the case, say that the defendant shall be prevented from dealing with any customer or customers whom he had solicited; but it appeared to me that that was too vague and too wide." He pointed out that a man might give the order afterwards without any reference to previous solicitation. Further on, when discussing the effect of the agreement, and showing that there was no implied obligation not to deal with the customer, he says: "It means that you are not to solicit customers." The impression produced upon my mind by the whole of the judgment is that the learned judge had not arrived at the conclusion that *Labouchere vs. Dawson*, L. R. 13 Eq. 322 was wrong. BRETT, L. J., expressed a decided approval of that decision. He was of opinion that, on the sale of a good will for a valuable consideration, there was an implied contract that the vendor would not solicit former customers, who were really the people who formed the good will.

The next case in which the matter was brought under the consideration of the court of appeal was that of *Walker vs. Mottram*, 19 Ch. D. 355. In that case the good will of the business carried on by a bankrupt had been sold by his trustees in bankruptcy. It was sought afterwards to restrain the bankrupt from soliciting the customers of that business. Sir GEORGE JESSEL, M. R., refused to grant an injunction on the ground that the doctrine laid down in *Labouchere vs. Dawson*, L. R., 13 Eq. 322, did not apply to the case of a bankrupt whose business had been sold by his trustees. This judgment was

affirmed by the court of appeal. Of the lord justices who then constituted the court, BAGGALLAY, L. J., expressed a strong doubt as to the correctness of the decision in *Labouchere vs. Dawson*, L. R., 13 Eq. 322. He said that it appeared to him, as at present advised, that it went far beyond what any of the previous decisions would have sanctioned. LUSH and LINDLEY, L. JJ., the other members of the court, said that the rule laid down in *Labouchere vs. Dawson*, L. R., 13 Eq. 322, had, it was believed, been recognized and acted upon in practice, and, whatever else might be said of it, the rule was in accordance with the general opinion of what was fair and right, and was easily applied.

In the case of *Pearson vs. Pearson*, 27 Ch. D. 145, the question came again before the court of appeal. The facts were there less favorable to the plaintiff than in the case of *Labouchere vs. Dawson*, and BAGGALLAY and LINDLEY, L. JJ., both considered that, even if *Labouchere vs. Dawson* was rightly decided, the case then before them was not governed by it. BAGGALLAY and COTTON, L. JJ., however, distinctly rested their judgments on the ground that the decision in *Labouchere vs. Dawson* was wrong and ought to be overruled. LINDLEY, L. J., on the other hand, was of opinion that it was rightly decided. The reason of BAGGALLAY, L. J., for dissenting from *Labouchere vs. Dawson*, so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere vs. Dawson* went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions. COTTON, L. J., examined the earlier decisions and arrived at the conclusion that Lord ELDON was against the notion that the vendor of the good will of a business was, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the good will. The learned lord justice pointed out that Lord ROMILLY rested his decision in *Labouchere vs. Dawson* on the principle that a man could not derogate from his grant. "But," he said, "it is admitted that a person who has sold the good will of his business may set up a similar business next door and say that

he is the person who carried on the old business; yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'good will' as would give a right to such an injunction as has been granted in the present case."

I propose now to examine the older authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere vs. Dawson*. It no doubt went beyond them, inasmuch as it dealt with a question not determined by them; but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Cruttwell vs. Lye*, 17 Ves. 335, 346, before Lord Eldon. The business of a bankrupt, who was a carrier between Bristol and London, had been sold by his assignees in bankruptcy. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath and London; but though the termini were the same the route employed was different. He addressed direct solicitation to the public for the carriage of their goods, stating that he had been reinstated in his business; and there was further, in the opinion of the lord chancellor, so much probability of direct solicitation to the customers of the old concern, in some few instances that the fact might fairly be assumed. Under these circumstances the purchaser of the bankrupt's business applied for an injunction. The case was therefore the same as *Walker vs. Mottram*, 19 Ch. D. 355, where Sir George Jessel—than whom no one has more strongly insisted upon the propriety of the decision in *Labouchere vs. Dawson*—was of opinion that no injunction should be granted. The bankrupt was no party to the contract of sale; there could therefore be no implied contract on his part to be derived from it. It is most material also to observe what was the nature of the injunction then in question. It was whether the bankrupt was to be restrained from carrying on the trade which he was pursuing of carrying goods between Bristol, Bath and London. The lord chancellor held that he could not be so restrained; and I think it must now be taken as settled that the sale of the good will of a business, even when the vendor himself is a

party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. But Lord ELDON certainly did not decide that such a vendor was entitled to solicit the customers of the old firm. He was not asked for an injunction to restrain the defendant from so doing. It was sufficient for the decision of that case that, in the opinion of the lord chancellor, there was no principle arising out of the provisions of the bankruptcy law upon which the court could hold that the bankrupt ought not to engage in the same trade and by the same road as before; though I think that, so far, the opinion of the lord chancellor would have been the same if the sale of the business had been effected by the bankrupt himself and not by his assignees.

The importance of the case consists in the definition which Lord ELDON gave of the good will there sold. He said: "The good will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage, I should, by interposing carry the effect of injunction to a much greater length than any decision has authorized or imagination ever suggested." These observations were much relied on by COTTON, L. J., in *Pearson vs. Pearson*, 27 Ch. D. 145. If the language of Lord ELDON is to be taken as a definition of good will of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord ELDON as an exhaustive definition.

"'Good will,' I apprehend," said WOOD, V. C., in *Churton vs. Douglas*, Joh. 174, 188, "must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The learned vice chancellor pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted the public are mindful whether it is carried on in Fleet street or in the Strand.

The question, what is meant by "good will," is, no doubt, a critical one. Sir GEORGE JESSEL, discussing in *Ginesi vs. Cooper*, 14 Ch. D. 596, the language of WOOD, V. C., which I have just quoted, said: "Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of good will." He pointed out that, in the case before him, the connection had been formed by years of work. The members of the firm knew where to sell the stone, and he asked: "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the good will thereof?"

The present master of the rolls took much the same view as to what constitutes the good will of a business. I cannot myself doubt that they were right. It is the connection thus formed together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the good will of a business. It is this which constitutes the difference between a business just started, which has no good will attached to it, and one which has acquired a good will. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment. What obligations then does the sale of the good will of a business impose upon the vendor? I do not think they would necessarily be the same under all circumstances.

In *Cook vs. Collingridge*, Collyer on Partnership, 2d Ed. 215, 27 Beav. 456, Lord Chancellor ELDON had to determine what orders were to be given where a partnership had expired by effluxion of time, and where the good will had to be valued. He declared that there existed no obligation upon the partners to restrain them from carrying on the same trade, or any of them wanting to do so; that a claim to have an estimated value put upon any subject that could be considered as described by the term "good will" could not be supported upon the same grounds or principles as those upon which a value was received from a partner buying the share of the partner going out of the business and retiring from the trade alto-

gether. He thought that all that could be valued was the chance of the customers adhering to the old establishment, notwithstanding that the previous partners or any of them carried on a similar business elsewhere.

In *Johnson vs. Helleley*, 2 D. J. & S. 446, a bill was filed by the surviving partner to wind up the business of the partnership. The usual decree was made. The chief clerk certified that it was most beneficial that the business should be sold as a going concern. The master of the rolls ordered it to be stated in the advertisement and particulars that the surviving partner would be at liberty to continue carrying on the business of a wine merchant in the same town and place. This judgment was affirmed by the Lord Justices. In *Hall vs. Barrows*, 4 D. J. & S. 150, Lord Chancellor WESTBURY said: "I think the direction to value the good will should be accompanied by a declaration defining what is meant by it, at least negatively; that is to say, a declaration that the good will is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business." In cases of this description, where a partnership has been dissolved by efflux ion of time or death, the good will is regarded as a part of the assets, and subject therefore to realization on winding up the partnership; but it would obviously be absurd that because a partnership becomes thus dissolved those who formerly constituted the firm, or the survivors thereof, where the dissolution has been due to death, should thereafter be restrained from carrying on what trade they pleased. Whatever restriction the sale of the good will may impose, it is clear that in this class of cases it could not extend to prevent the former partners carrying on a similar trade to that in which they were previously engaged. It is noteworthy that in *Johnson vs. Helleley*, 2 D. J. & S. 446, it was thought necessary to warn intending purchasers that, though the good will was being sold, one of the persons who had previously carried on the business might continue to trade in the same town; and Lord WESTBURY thought it necessary to give the same warning to the person who was to value the good will in *Hall vs. Barrows*, 4 D. J. & S. 150.

These circumstances appear to me to afford an indication that the courts recognized that their view of what was meant by "good will" and the effect of a sale of it differed from the

popular conception. Where the good will of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the good will of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business. This is really the strong point in the position of those who maintain that *Labouchere vs. Dawson*, L. R. 13 Eq. 322, was wrongly decided. COTTON, L. J., says: "It is admitted that a person who has sold the good will of his business may set up a similar business next door and say that he is the person who carried on the old business. Yet such proceedings manifestly tend to prevent the old customers from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so?" I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet possibly to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the good will and endeavor to destroy it. If a person who has previously been a partner in a firm sets up in a business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those

carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the good will away from the persons to whom it has been sold and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business, but this in many cases appears to me of little importance, and of small practical advantage, if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in the terms employed in *Labouchere vs. Dawson*, L. R. 13 Eq. 322, there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not. In several cases such injunctions were granted, and there is nothing to show that any practical difficulty arose in enforcing them. It is not material to consider whether, on the sale of a good will, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based upon the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity. I have so far dealt with the case as if the good will had been sold, but I think the rights and obligations must be precisely the same for present purposes when, on the creation of a partnership, it has been agreed that the good will shall belong exclusively to one of the partners.

For these reasons I think the judgment must be reversed and that an injunction should be granted in the form adopted in *Labouchere vs. Dawson*, L. R. 13 Eq. 322, with the modifica-

tion rendered necessary by the circumstance that here the partnership has not yet expired.

Under the very peculiar circumstances I think that no costs should be given here or in the court of appeal.

Lords MACNAGHTEN, DAVEY and ASHBOURNE, concurred.

Order of the court of appeal reversed, with a declaration that the appellants are entitled to an injunction restraining the respondent, his partners, servants, or agents, from applying privately, by letter, personally, or by a traveler, to any person who was, prior to the dissolution of the partnership, a customer of the firm of Tabor, Trego & Co., asking such customer to continue after the dissolution to deal with him, the respondent, or not to deal with the appellants; the respondent to repay to the appellants the costs in the court of appeal paid by them to him.

Cause remitted to the chancery division.

# VII.

## RIGHTS AND DUTIES OF PARTNERS TOWARD EACH OTHER.

### LATTA vs. KILBOURN.

*United States Supreme Court, 1893.*

150 U. S. 524, 37 L. Ed. 1166.

Bill in equity by Kilbourn and Olmstead against Latta for an account of profits made by the latter in transactions which the former claimed were partnership transactions and the benefit of which therefore enured to the firm, of which all three had been members but which was now dissolved. Latta and Kilbourn had been partners as "real estate brokers and auctioneers" under the firm name of Kilbourn & Latta. Afterwards Olmstead was taken into the firm, the name remaining the same. During the continuance of the firm, Latta entered into real estate speculations with one Dr. Stearns, which resulted in large profits, and it was to secure a share in these that this action was chiefly instituted. The court below decreed that Latta should account to his former partners for these profits, and Latta appealed. It was claimed by complainants that, when Olmstead was taken into the firm, a new arrangement was made to the effect that if either member heard of a piece of property for sale and saw an opportunity for speculation, or was going into any speculation, it should be communicated to the firm, so that the other partners also might have an opportunity of going into the speculation.

Other facts appear in the opinion.

*W. D. Davidge*, for appellant.

*Enoch Totten* and *W. F. Mattingly*, for appellees.

JACKSON, J. (After stating the facts and disposing of other matters.) The court below based its opinion upon two grounds: First, that the scope of the copartnership business and agreement, as alleged in the third paragraph of the bill, was established, and that the appellant could not engage in purchases of real estate on his own account or in connection with others except by the consent of his copartners, without violating the duty and obligation which he owed to his firm; and, secondly, that, even if the copartnership did not include the business of buying and selling real estate on partnership account, still the appellant could not employ the knowledge and information acquired in the course of the partnership business in respect to the real estate market, in making purchases or transactions for his own benefit.

The general principles on which the court proceeded admit of no question, it being settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information, which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

It therefore becomes necessary, in testing the liability of the appellant to account for the profits realized from the transactions with Stearns, to consider and ascertain what was the scope of the partnership agreement in reference to the purchase and sale of real estate. This is the underlying and essential fact on which rests the proper determination of the question whether the appellant, in engaging in the joint enterprise with Stearns, violated any duty or obligation which he owed to the firm of Kilbourn & Latta. In other words, the question on this branch of the case depends entirely upon this:

Were or were not those transactions within the scope of the firm business, in respect to which Latta owed a duty to his firm, or in respect to which he could properly be said to be the agent of the firm?

In his answer, which was called for under oath, Latta positively and in direct terms denied the allegation of the bill that it was ever agreed that the firm should carry on the business of buying and selling real estate, and that at no time was such transaction within the scope of the partnership business.

Under the well-settled rules of equity pleading and practice, his answer must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. The proofs in the present case not only fail to break down his denial on this point, but on the contrary affirmatively establish that neither under the first nor the second firm of Kilbourn & Latta did the partnership agreement extend to the business of buying and selling real estate either for investment or for speculation on firm account. The appellee Kilbourn, when pressed upon the question, evaded a reply thereto, and Olmstead, in his sworn testimony, failed to support the allegation of the bill as made on that particular subject. On the other hand, the testimony of the appellant fully supported the denial of his answer, and he is corroborated by all the facts and circumstances in the case, such as the character of the business as advertised and as actually conducted. The well-known characteristics of "real estate and note brokers," indicating as the words imply, those engaged in negotiating the sale and purchase of real property for the account of others, afford a presumptive limitation upon the scope of the business, such as the appellant asserted and testified to in this case. His sworn answer and testimony on this point has not been overcome by the vague and equivocal testimony of the appellees. The court below was in error in finding as a matter of fact that the partnership extended to the buying and selling of real estate for the account of the firm. There is, therefore, no right on the part of the complainants to relief in this cause, based upon the consideration that the scope and character of the partnership business embraced the purchase and sale of real estate, either for the firm alone, or jointly with others.

The further allegation of the bill, "that all profits resulting from operations in real estate by any member of the firm

of Kilbourn & Latta during the existence of said partnership should belong to said firm and be entered upon the books of the firm and be paid into the partnership account, and that no member of said firm should engage in the business of buying and selling real estate in the said district on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the said firm, and the firm had declined to take any part therein," was also positively denied by the answer of the appellant under oath. There is no testimony in the cause to overcome that denial. On the contrary, the evidence establishes that there was no such restriction or limitation imposed upon the individual members. So that the complainants were entitled to no relief on that ground.

But aside from the foregoing questions of fact, how stands the case on the assumption that there was a new stipulation or agreement when Olmstead was taken into the firm (as claimed by Kilbourn and Olmstead, and as set out above) that knowledge and information obtained by any member of the firm as to bargains in real estate should be first communicated to the firm, with the view of giving the firm, or the members thereof, the first opportunity of purchasing, before any individual member thereof could act upon such knowledge or information for his own benefit? Can the agreement to furnish information as to bargains in real estate and give copartners the option of taking benefit of such bargains, be considered as so enlarging the scope of the partnership business as to include therein the purchase and sale of real estate on joint account? It would be a perversion of language and a confusion of ideas to treat such a stipulation, if it were clearly established, as creating a partnership in future options to buy what did not already, by the terms of the copartnership, come within the scope and character of the partnership business. That alleged stipulation, instead of enlarging the partnership business, was manifestly a restriction and limitation upon the power and authority of the copartners to bind the firm, or the members thereof, in any real estate transaction, until each member had expressly consented or agreed to join in the particular purchase, specially submitted for consideration.

By the well-settled law of partnership each member of the firm is both a principal and an agent to represent and bind the firm and his associate partners in dealings and transactions

within the scope of the copartnership. No express authority is necessary to confer this agency or fiduciary relation in respect to the business of the firm. If the buying and selling of real estate was a part of the business of Kilbourn & Latta, the alleged stipulation about giving an option to the firm and the members thereof to accept special bargains would have been an idle arrangement. But under the alleged stipulation each and every purchase of real estate was a special and individual transaction or enterprise, requiring the special assent and agreement of each partner thereto, before it became a subject of partnership, or was brought within the scope of the partnership business. Under the operation of the agreement, a partner who purchased real estate, either on joint or partnership account, did so not under or by virtue of the partnership articles, or under authority derived from the partnership business and his implied agency to represent the firm therein, but solely and exclusively from the special assent or agreement of his associates to engage in that particular purchase. So that each parcel of real estate to be acquired, as well as the agreement to purchase the same, was first made the subject of a special arrangement. It is difficult to understand how, under such circumstances and conditions, a copartnership could properly be said to include or extend to the business of purchasing and selling real estate.

The special subject of each purchase, as admitted by Kilbourn,—like the purchase of bonds and other securities,—did not and could not come within the operation of the copartnership, or become a part of the partnership agreement, until each particular piece of property had been selected and agreed upon. It is undoubtedly true that, under this alleged agreement, if a partner had submitted to the firm or his associates the question of buying a particular parcel of land, and they had agreed to make that purchase, he would thereafter have occupied an agency or fiduciary relation in respect to that particular piece of property. But the question here is whether his failure to give the firm, or his copartners, the opportunity of making an election to buy certain real estate, and his making the purchase thereof for his own account, or jointly with another, is such a violation of his fiduciary relations to the firm and his associates in respect to copartnership business as to entitle the latter to call him to account for profits realized

in such transactions. In other words, will the violation of his undertaking to give to the firm, or his associates, the opportunity or option to engage in any particular transaction, not within the scope of the firm's business, entitle the copartners to convert him into a constructive trustee in respect to the profits realised therefrom?

That the members of the firm, prior to 1871, or after that date, by special agreement, made purchases of particular parcels of real estate on speculation or for investment, did not make such speculative transactions a part of the partnership business so as to invest either partner with the implied authority to engage therein on account of the firm. The name of the firm was never, in fact, used in such special ventures, which no partner had authority to enter into except, and until, the consent of the others had been specifically obtained so to do—each instance of buying on firm or joint account being the subject of a separate, special, and distinct agreement.

It may be said of any and every partnership, irrespective of its regular business, that by consent of all the members, other matters beyond the scope of the partnership may become the subject of investment or speculation on joint account, but such special transactions cannot properly be said to come within the scope of the partnership. The very fact that the express consent of each partner was required in order to engage in such special ventures goes clearly to show that the transactions were not within the scope of the partnership, for, if they were, special consent could not be required as a condition precedent for engaging therein.

Matters within the scope of the partnership are regulated and controlled by a majority of the partners, but by the alleged stipulation under consideration a single member of the firm could control the firm's action in respect to purchases of real estate. This is inconsistent with the idea that the business of the firm extended to such purchases.

Again, the alleged agreement does not provide how such future acquisitions as might be specially selected or agreed upon for speculation or for investment were to be paid for, or in what proportion the several partners should be interested therein. Neither does it distinctly appear from the allegations of the bill, nor from the testimony of the appellees, whether, in acting upon information given, the special pur-

chases were to be made for the account of the partnership or for the account of the several members of the firm. The methods of keeping the accounts of such transactions in the name of the individual members rather than in the name of the firm, would indicate that such purchases were for the benefit of the separate partners rather than for the firm.

There is no allegation in the bill, nor any direct statement in the testimony of the appellees, that if the information had been given as to the Stearns' transactions, either the firm or themselves would have exercised the option of engaging therein upon the conditions of allowing Stearns to determine "when, at what price, and on what terms any portion of the real estate might be sold." Neither is it alleged in the bill, nor shown by the proofs, that the appellant in any way neglected the partnership business, nor that the firm and his copartners sustained any damage whatever from the transaction. On the contrary, it is shown that from the purchases and sales of the property bought on joint account with Stearns the firm derived its regular commissions.

This alleged new stipulation amounts, if it has any legal force and operation, simply to an agreement for a future partnership, or the joint acquisition of such special properties as might by mutual and unanimous consent be considered as holding out a prospect of profitable speculation; and at most could only be regarded as an agreement for a future partnership in respect to such properties as might be specially selected for speculation. It is well settled in such case that no partnership takes place until the contemplated event actually occurs. It stands upon the same principle as an option to become a partner, which creates no partnership until the option is actually exercised.

If the stipulation in question could be construed into an agreement that no partner should engage in the buying and selling of real estate on his own account, would that entitle the other members of the firm to share in the profits that Latta made in real estate speculation without having first secured the consent of his copartners to his engaging therein? No such proposition can be sustained.

In *Murrell vs. Murrell*, 33 La. Ann. 1233, it was held that a partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his origi-

nal copartner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages, but inasmuch as the original copartner could not be held, without his consent, for the debts of the new firm, he cannot claim to be made a partner therein.

In *Dean vs. McDowell*, 8 Ch. D. 345, one of the stipulations in the articles of copartnership was that "said C. A. McDowell should diligently and faithfully employ himself in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership," and by another article it was stipulated that neither partner should "either alone or with another person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership." The business of the firm was to deal as merchants and brokers in selling the produce of salt works on commission, and during its existence McDowell clandestinely purchased a share in a firm of salt manufacturers. A bill was filed by the other partner for an account of the profits realized in the new business, and it was held by the master of the rolls that the bill could not be sustained. On appeal this judgment was affirmed. Lord Justice JAMES, after stating the general principles of partnership law, said: "The business which the defendant has entered into was that of manufacturing salt, which was to be the subject-matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made—if by his joining in the partnership for the manufacture he had diverted the goods from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty; but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a shareholder in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damage done to the original firm by reason of his having become a shareholder in the works which produced the thing in which the firm traded. Under these circumstances it seems to me that we cannot say his profits from the new business was a benefit arising out of his partnership with the plaintiffs. It was not a benefit derived

from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. His relations to the partnership in this respect was the same as an ordinary covenantor to a covenantee in respect of any other covenant which is broken. It was a covenant by a partner with a copartner, a covenant that he would not do something which might result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between the parties. That being so, it seems to me that the master of the rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which, as between the parties, there really was nothing but a breach of covenant, which in truth did not result, and could not have resulted, in the slightest loss to the partnership, unless it could have been shown that it led to the covenantor neglecting the business of the partnership, and devoting himself to other business, and diverting his time and attention from the business to which it was his duty to attend." These views, which were concurred in by the other members of the court, are directly in point in the present case, which, in principle, cannot be distinguished from the case there under consideration.

We are clearly of the opinion that the alleged new stipulation that each copartner should furnish to the firm, or to the members thereof, information as to bargains in real estate, and give it or them the option to engage in the acquisition thereof before acting upon such information for his own benefit, neither enlarged the scope of the partnership so as to make it include the purchases and sales of real estate, nor precluded any member of the firm from making purchases on his own account or jointly with others; and that the act of the appellant in purchasing property with Stearns was not such a violation of his duty and obligation to the firm of Kilbourn & Latta, or to the members thereof, as to entitle the appellees to share in the profits which he realized therefrom.

In respect to the second ground, on which the court below rested its judgment, that the appellant could not take advantage of the skill, knowledge, and information as to the real estate market acquired in the course of his connection with the partnership of Kilbourn & Latta so as to gain any profit individually therefrom, but was bound to share with his

copartners all the beneficial results which could be derived from his knowledge or information on that subject, we need not do more than to say that this proposition is wholly unsupported either by the authorities or by any legal principle applicable to partnership law.

It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of *Aas vs. Benham*, 2 Ch. D. (1891) 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice LINDLEY that if a member of a partnership firm avails himself of information obtained by him in the course of the transactions of the partnership business, or by reason of his connection with the firm, *for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business and not competing with it, the firm is not entitled to an account of such benefits.*

It was further laid down in that case, in explanation of what was said by Lord Justice COTTON in *Dean vs. McDowell*, *ubi supra*, that "it is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd;" and it was said by Lord Justice BOWEN that the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right.

Tested by these principles, it cannot be properly said that Latta used any information which was partnership property

so as to render him chargeable with the profits made therefrom. His knowledge of the real estate market, or in respect to profitable investments therein, was not used in competition with the business of the firm, nor in any manner so as to come within the scope of the firm's business.

The points already considered being sufficient to dispose of the case, we do not deem it necessary to go into the other question discussed as to whether a parol partnership, in respect to purchasing and selling real estate, or an agreement between copartners to give each other the option of engaging in such purchases, would come within the operation of the statute of frauds.

We are clearly of opinion, upon the whole case, that the decree should be

*Reversed, and the cause remanded to the court below with directions to dismiss the bill at the cost of the appellees.*

NOTE.—See Mechem's Elem. of Partn., §§ 113, 118.

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## INSLEY vs. SHIRE.

*Supreme Court of Kansas, 1895.*

54 Kan. 793, 39 Pac. Rep. 713, 45 Am. St. Rep. 308.

Insley and Shire were equal partners in carrying on banking and other business at Leavenworth, Kansas. In 1882, Shire died, leaving a will, under which Ann M. Shire (his widow), J. W. Gaw (his brother-in-law), and Levi Wilson, were appointed executors and were authorized to continue the business of the firm. This was done, and no steps were taken to ascertain Shire's interest nor did Insley assume the position or rights of a surviving partner. Insley and Shire's executors continued to carry on the business, Gaw taking the active management on the part of the executors, until 1887, when the firm was found to be insolvent. It appeared also that one Milligan, who had been employed by Gaw to serve in the Bank, had fraudulently appropriated a large part of the assets. Mrs. Shire brought this action against Insley, Gaw, Milligan and others, to recover damages for what was alleged to be their

negligent mismanagement of the business resulting in insolvency and the loss of the assets.

The court below found that Insley and Gaw had been guilty of such negligent mismanagement, and rendered judgment against them, from which this appeal was taken.

*W. C. Hook* and *D. M. Valentine*, for appellant.

*E. Hagan*, *Hayden & Hayden*, *T. A. Hurd*, and *L. B. & S. E. Wheat*, for appellees.

JOHNSTON, J. (After disposing of the question of Gaw's liability as an executor, and of Insley's liability as a coexecutor.) There is the further contention that the plaintiff could not maintain an action against Insley for the purpose of obtaining an accounting of the partnership business. This contention is based upon the idea that all of the executors represent the Shire interest in the partnership, and, as the estate is joint and entire, the executors are to be considered in law as one person, and all of them must join as plaintiffs. This is the correct rule, and all three of the representatives of the estate should have joined in bringing the action for an accounting with Insley. 7 Amer. & Eng. Ency. of Law, 360, and cases cited; 11 Amer. & Eng. Ency of Law, 1033. No proper objection, however, was made on account of the nonjoinder of Gaw and Wilson, and, as they were made defendants in the action in their representative capacity, and remained in the court throughout the proceeding, while the accounting was being made, the failure to name them as plaintiffs cannot be regarded as a fatal objection. Treating the proceedings, then, as one in which all of the representatives of the estate had joined in asking an accounting of the partnership business, the question remains as to the liability of Insley. Insley and Shire, as we have seen, were equal partners. When Shire died Insley did not give a bond and take possession of the partnership property as surviving partner, as he might have done under the statute[1]. The death of Shire operated to dissolve the partnership, but it appears that by a mutual arrangement, and in accordance with the provisions of the will, the business was continued by the executors upon the same terms as it was during the lifetime of Daniel Shire. This arrangement had the effect of creating a new partnership, composed of the executors on one side and Insley on the other.

[1] See *Shattuck vs. Chandler*, *ante*.

Some attempt is made to hold Insley to the liability of a surviving partner under the law, but, from the testimony, it is clear that he was not so regarded or treated by any of the parties. He did not assume title and control as surviving partner. No bond was given by him; no inventory of the partnership estate was made; and he did not take the management of the partnership estate as surviving partner. On the contrary, all the parties united in the control and possession of the property; the executors, representing the Shire interest, and Insley, representing his own, they joined together in carrying on the business until it was discontinued. They were partners to all intents and purposes, and all alike equally owed the duties of partners to each other. There was no agreement for a division of labor between the executors on one side and Insley upon the other. Insley was not employed to represent the executors or to attend to the business of the partnership for the estate. It is true that he devoted most of his time and attention to the partnership business, but, from 1885, Gaw was employed on behalf of the estate to attend to the Shire interest in the partnership, and he received an annual salary of $1,000 as compensation for his services. There is a finding by the referee that he undertook to represent the Shire interest in the partnership, and was continuously so engaged down to the close of the bank.

The claim that Insley was general manager for the firm, and liable as such, is not sustained by the record. While he was active in the management of the affairs of the firm, he was not appointed nor employed as manager, nor did he hold any official position which made him the representative of the estate in the firm business. There was no agreement that he should receive compensation as manager or agent for the firm, and none was allowed or paid. It is true that, when the controversy arose between the parties, a credit was entered and a claim for extra services made, but, as there was no such agreement, it was not allowed and it appears to have been abandoned. So far as the partnership accounting is concerned Insley is to be treated as a one-half owner and the Shire estate as the owner of the other half interest. The three executors are to be regarded as one person, and together they sustain the same relation to Insley that Shire did in his lifetime. Insley owed them, as partners, no higher duty or any greater diligence than he would have owed to Shire under similar circumstances if he had been alive. It was the duty of the

partners to devote their time and best endeavors to carry on the business, and promote the prosperity of the partnership. In the absence of any special agreement between them as to the division of labor, each should give time and attention to the conduct of business without compensation, and without regard to the relative value of the services of the several parties: Parsons on Partnership, 3d Ed. 244; 17 Amer. & Eng. Ency. of Law 1056. Scrupulous good faith and reasonable diligence is required from each to the other, and all losses caused by culpable neglect of duty or bad faith on the part of a partner are chargeable against him in favor of the firm. "A fair degree of care only, however, is required. An honest mistake of judgment, or a trivial departure from the partnership agreement in cases of emergency, will not impose the burden of the losses of the firm on the deviating partner." 17 Amer. & Eng. Ency. of Law, 1219.

A partner of equal responsibility, and who himself is indifferent to his own interest or guilty of negligence, is hardly in a position to claim and recover for the entire losses resulting from the negligence of both. In this case the duty of carefully selecting employés and supervising the business of the partnership rested equally upon Insley and the representatives of the estate; and yet we find that the entire loss resulting from the fraud and defalcation of employés was placed upon a single partner. The principal losses resulted from the action of Milligan in abstracting and purloining money from the bank. Gaw, who was giving special attention to the interests of the Shire estate, procured the employment of Milligan, who was a relative, and there is testimony that Milligan was employed and placed on the working force of the bank as a representative of the Shire estate. It was as much the duty of those representing the estate to exercise a watchful care over the conduct of Milligan and the other employés as it was of Insley. The accounts which he fraudulently manipulated and the books which he falsified were under the eyes and supervision of the partners. Why, then, should Insley account for all these losses? If Shire had been alive, and had selected Milligan as an employé, and he had been guilty of frauds similar to those charged against him, and if there had been no other division of labor or responsibility between Insley and Shire than did

exist while they were partners, how could Shire have claimed that Insley should bear all the losses resulting from the frauds and peculations of Milligan?

It appears that the methods by which Milligan abstracted and purloined the money of the firm were so ingenious as to almost baffle the skill of expert accountants, and several weeks were consumed before they were able to uncover the fraud and determine by whom the money was taken. Insley was not a bookkeeper nor an expert accountant, and no reason is seen why he should be held to a higher degree of care with respect to the books than those representing the other interests. Where the partners share alike in the control and labor of business one of them cannot sit passively by, indifferent to the interests of the firm, and after neglecting to use reasonable diligence himself, hold the other responsible to the firm for a like indifference or negligence. It does not appear that Insley had any special skill as a banker, and as a partner he cannot be held for the lack of skill in that respect. His partners had a right to expect reasonable care and diligence from him in assisting to carry on the business, but they knew what his capabilities were when they entered into business with him, and therefore have no right to complain of a lack of ability or skill. The charge of bad faith and of conspiracy with Gaw was not sustained because there was an express finding that Insley did not participate in any fraudulent transaction of the employés or in any of the fruits thereof, and, more than that, that he had no knowledge of the same. It is clear that the accounting was made upon an incorrect theory. The liability of Insley was extended beyond what was warranted by the evidence or the law, and hence the judgment cannot be sustained.

Reversed.

NOTE.—See Mechem's Elem. of Partn., § 214.

## MURPHY vs CRAFTS.

*Supreme Court of Louisiana, 1852.*

12 La. Ann. 519, 71 Am. Dec. 519.

Plaintiff and defendant were commercial partners, transacting a general commission business under the name and style of Murphy & Crafts, in the city of New Orleans. Their contract of partnership was in writing, and the third article thereof was in these words: "We will not indorse any note, draft, or give our signatures separately or collectively, except for our legitimate business purposes." Crafts, in violation of this article, accepted in the partnership name, for the accommodation of his brother-in-law, John C. Robertson, of the city of Boston, bills of exchange to the amount of $12,500. Robertson failed in business, and the firm of Murphy & Crafts lost, by these acceptances, the sum of $5,592.90. The action was by Murphy against Crafts to recover indemnity for this loss. Judgment below for plaintiff, and defendant appeals.

*Singleton & Clack*, for plaintiff.

*Coxe & Breaux*, for defendant.

LAND, J. (After stating the facts.) The principal question in this case is, whether Crafts is liable to his partner for the loss. (Omitting references to the code). Judge STORY, in his Commentaries on the Law of Partnership, says: "One of the most obvious duties and obligations of all the partners is strictly to conform themselves to all the stipulations contained in the partnership articles, and also to keep within the bounds and limitations of the rights, powers, authorities, and acts belonging and appropriate to the due discharge of the partnership trade or business. Of course every known deviation from and every excess in the exercise of such rights, powers, authorities and acts, which produce any loss or injury to the partnership, are to that extent to be borne by the partner who causes or occasions the loss or injury, and he is bound to indemnify the other partners therefor. The same doctrine is recognized by Pothier as existing in the French law; and it

seems, indeed, so clearly the result of natural justice as to require no particular exposition." Sec. 173.

According to these rules, the defendant is clearly bound to indemnify the plaintiff for the loss resulting from his breach of the third article of their contract of partnership, unless the same was superseded or waived in the course of their business, with the assent of the plaintiff. And this is the defense made by the defendant to the action; but we concur with the district judge that the evidence is insufficient to show that the partners came to a new arrangement, in the course of their business, and thereby superseded article third of their contract, or that the plaintiff ratified the acceptances in favor of Robertson. * * *

Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 115.

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## WEBB vs. FORDYCE.

*Supreme Court of Iowa, 1880.*

55 Iowa 11.

The parties to this action had been partners, and, having dissolved and not being able to adjust their accounts, each had brought an action against the other. The case was tried before a referee, who found that defendant had drawn out of the partnership funds the sum of $11,187.74, and that he had accounted for $8,404.72, leaving a balance due from him of $2,783.02. As to this, defendant testified that all of the money he had drawn out had been properly applied to partnership uses, but he was unable to make any statement of his disbursements, having no account whatever of many of his transactions.

Judgment was rendered against him, and he appealed.

*L. Evans*, for appellant.

*Crum & Flick*, and *Whiffin & Brown*, for appellee.

ROTHROCK, J. (After stating the facts.) The sole question presented by appellant in this appeal is whether the defend-

ant should be held liable for such of the partnership funds as came into his hands, and for which he could render no account and as to which he could but testify generally that he did not convert the same to his own use.

It is contended that the question presented is the same as that determined in *Davenport vs. Schutt*, 46 Iowa, 510. But we think the cases are quite different. In that case Davenport delivered to Schutt promissory notes, for the purpose of effecting loans by discounting the notes. Schutt, as the agent of Davenport, sold the notes and paid the proceeds to Davenport. It was held that there was no more obligation upon one party to keep books of account than the other, and that Schutt was not liable merely because he could not show an itemized statement of the transactions between the parties, and that being a credible person, and having testified positively that he had paid and disposed of all sums realized by him from plaintiff's notes as directed by the plaintiff, this, in the absence of some account or showing by Davenport that the proceeds of the notes were not accounted for, was a sufficient defense. In that case no confidence nor trust as to the disposition of the proceeds of the notes was reposed in Schutt. He was to pay to Davenport, who could well have kept a correct account of all the notes deposited and payments made.

Here the relation of the parties is quite different. Each checked out the funds of the partnership at will, upon his own check, and it was the duty of each to account to the firm for what he drew out. If the defendant drew checks and obtained the money thereon its expenditure was a matter peculiarly within his own knowledge. The plaintiff was entitled to some showing more than a general statement that the proceeds of the checks were used for partnership purposes. "All partners having any charge of the business of the firm are bound to keep constantly, regular, intelligible and accurate accounts of all the business, and to give all the partners at all times access to them and to the means of verifying them." Parsons on Partnership, p. 527.

Affirmed.

NOTE.—See Mechem's Elem of Partn., § 116.

## YORKS vs. TOZER.

*Supreme Court of Minnesota, 1894.*

59 Minn. 73, 60 N. W. Rep. 846, 26 L. R. A. 86.

Plaintiff and defendant were partners in respect to one parcel of land, the title to which was taken in defendant's name. Defendant negotiated a sale of the land, without the plaintiff's knowledge, but, on obtaining an abstract, the title appeared defective in lacking one conveyance. The title was, however, perfect, and the fault was in the abstract. Plaintiff could have informed defendant of this error, but, without consulting plaintiff, defendant paid $526, to procure a conveyance to supply the supposed deficiency. The action was by plaintiff for an accounting for the proceeds of the sale, and the defendant sought to be allowed the $526 so paid.

Disallowed and defendant appeals.

*Clapp & McCartney*, for appellant.

*Henry N. Setzer*, for appellee.

CANTY, J. (After stating the facts.) The court [below] finds that defendant acted in good faith in the sale of the land, and in expending said sum of $526 in attempting to cure the supposed defect in his title, but holds that he cannot compel plaintiff to stand one-half or any part of such expense. We are of the same opinion. If defendant did not act in bad faith, he was, to say the least, grossly negligent. It does not appear that plaintiff was not accessible and could not be communicated with in a reasonable time. This land was the only partnership property, and its purchase and sale was the only partnership business. It was not an act in the usual course of the partnership business, but one which went to the very foundation of the partnership. It is found by the court that the plaintiff, and not the defendant, conducted the negotiations for the purchase of this land, and procured the conveyance to defendant; and he should be presumed to have had some knowledge of the state of the title. No reason is given by defendant why all negotiations for the sale of the land and the purchase of this supposed title by him were kept secret

from plaintiff. In every important exigency the partner about to act should consult the other partner, at least, if there are no circumstances which excuse him from so doing.

Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 117.

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## LINDSEY vs. STRANAHAN.

*Supreme Court of Pennsylvania, 1889.*

129 Pa. St. 635, 18 Atl. Rep. 524.

Action for accounting of partnership transactions. It appeared that J. A. Stranahan had carried on business alone until 1876, when J. K. Lindsey bought a half interest in it and the two united as partners under the firm name of J. K. Lindsey & Co. After the formation of the firm Stranahan left the entire management and control of the business to Lindsey. On the settlement, Lindsey claimed compensation for thus managing the business. The matter was referred to masters in chancery to state an account, and they reported, among other things, as follows: "No express agreement or contract was made by said partners that either of them was to receive compensation for services rendered by either of them in the business of the partnership; but as Lindsey took credit for his services from time to time on the books of the firm, and such books were open to the inspection of Stranahan, he must be presumed to have known the fact and to have assented thereto; and, as it is not to be presumed that the said Lindsey would render his services in managing the affairs of said partnership for nothing, we, therefore, find as a fact, that there was an implied contract that Lindsey should receive such compensation for his services as they were reasonably worth." They therefore credited him with "salary, $3,700."

The court below disallowed this claim, and Lindsey appealed.

*S. and S. B. Griffith*, for the appellant.

*J. A. Stranahan*, for appellee.

PER CURIAM. There is but a single question in this case: Is J. K. Lindsey, the plaintiff, entitled to compensation for his services as a partner? It is conceded that there was no express contract that he should be paid for such services, and there is no principle better settled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable; as much so as that between parent and child. Were it otherwise, we might have a contest between the partners upon the settlement of every partnership account, as to the value of their respective services. It is true this principle may work hardship in particular cases; almost every general rule does, but that is a weak argument against the soundness of the rule. When the copartnership agreement contemplates that one partner shall manage the business, or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then made, as before said, the law will not imply one. Even where a liquidating or surviving partner settles up the business, it has been repeatedly held that he is not entitled to compensation for doing so, although, in such case, he performs all the service; *Beatty vs. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Brown vs. McFarland*, 41 Pa. 129, 80 Am. Dec. 598; Gyger's Appeal, 62 Pa. 73, 1 Am. Rep. 382; Brown's Appeal, 89 Pa. 139.

Judgment affirmed.

NOTE.—See also Mechem's Elem. of Partn., §§ 119, 120, for other cases to the same effect. The same general rule ordinarily governs the allowance of interest to one partner upon money advanced by him for partnership purposes. See Mechem's Elem. of Partn., § 121.

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## McFADDEN vs. LEEKA.

*Supreme Court of Ohio, 1891.*

43 Ohio St. 513, 28 N. E. Rep. 874.

McFadden, Leeka, and a large number of others organized an unincorporated association known as The Union Pork House Company, under a constitution and by-laws agreed upon. The affairs of the association were in charge of a board

of directors provided for by the by-laws, and elected from the members. One of the purposes of the organization was the erection of a packing house. By-law VIII provided that the directors should not incur indebtedness beyond the available capital of the company. In erecting the packing house, the contributions from the members proved insufficient, and the directors borrowed large sums on their personal responsibility. They then procured a mortgage upon the property to secure them against this indebtedness, foreclosed the mortgage, bought in the property, and, after applying the proceeds upon this indebtedness, brought this action against all the stockholders to recover a large balance remaining unsatisfied. Leeka was one of these directors and McFadden one of the stockholders so sued.

Judgment below against McFadden and others, and they brought error.

*Alphonso Hart*, for plaintiffs in error.

*Steel & Hough*, and *Uric Sloane*, for defendant in error.

DICKMAN, J. (After holding that the association was a partnership and that the rights and liabilities of the members were to be determined as partners). When the directors, finding they were able to collect only eight thousand and five hundred dollars of the stock, proceeded to contract an indebtedness largely in excess of the available capital of the company, and in disregard of a plain provision of an unchanged by-law, their action, as between the partners, was binding only upon those who either assented beforehand to the creation of the indebtedness or ratified it after it was incurred. In general, the act of one or more partners in contravention of the partnership articles in a substantial point, cannot, as among the members of the firm, bind the non-assenting partners.

One of the most obvious duties and obligations of all partners is, strictly to conform themselves to all the stipulations contained in the partnership articles. In respect to the extent of the partnership as stated in the articles, courts of equity construe the articles strictly, and do not permit the business to be extended by any of the partners without the consent of all of them. Story, Part., secs. 173, 193. In the management of the interior concerns of the partnership among themselves,

the weight of authority is in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership, and when all have been consulted. 3 Kent's Com., 45. But unless special provisions in the articles of association be made to the contrary, this right of the majority does not extend to the right to set aside, or materially change any of the articles of the partnership. In effecting such a change, or in substantially violating any of the articles, it is essential that all should unite; otherwise, it is not obligatory upon them. Colly. Part., 3d Am. Ed., 182. In no case can the majority bind the minority *inter sese* to anything expressly stipulated against in the contract, or which is not fairly within the scope of the partnership business, and *that* cannot be considered within its scope which in any respect is subversive of the fundamental agreement. *Abbott vs. Johnson*, 32 N. H. 9; 1 Wood's Colly. Part. sec. 155, p. 285, N.

In *Davies vs. Hawkins*, 3 Maule and Sel. 488, a company was formed for brewing ale, and by deed they confided the conduct of the business to two persons, who were to be trustees of the company. General quarterly meetings of the company were to be held. It was resolved by the King's Bench, that one person only could not be appointed at a general quarterly meeting in place of the two originally appointed under the deed, unless such alteration was made with the consent of all the subscribers. Lord ELLENBOROUGH said, that "a change had been made in the *constitution* of this company, which could not be made without the consent of *the whole body of the subscribers*. It was such a substituted alteration in its constitution as required the consent of all."

The right of contribution and indemnity between partners grows, in a large measure, out of the agency of the partner seeking reimbursement. Each member, as an agent of the firm, is entitled to be indemnified by the firm, against liabilities *bona fide* incurred by him while pursuing the authority conferred upon him by the agreement entered into between himself and his copartners; but he has no right to claim contribution from the other members of the firm, for liabilities incurred in disregard of the authority thus reposed in him. It devolves upon agents and trustees who seek indemnity from their principals and *cestuis que trustent*, to show that they have

not acted contrary to their instructions, for on principle they will not be entitled to any indemnity or reimbursement for losses and expenses incurred while so acting. And this rule has been applied to directors of companies. In The Worcester Corn Exchange Company's Case, 3 De Gex, Mac. & G. 180, a company was organized for the purpose of building a corn exchange. The deed of settlement of the company limited the amount of each shareholder's subscription, and authorized the directors to create new shares, and to raise the money by borrowing, under certain restrictions. The capital of the company being expended, and more money being required, the directors advanced money themselves, and expended it in payment of debts of the company. They also, but in excess of their powers, borrowed money of a bank which had notice of the company's deed. It was held that the directors were not entitled to charge the shareholders, either in respect of the advances, or in respect of the bank debt, beyond the amount of the capital which each shareholder had agreed to subscribe. And this decision is pronounced to be, "strictly in conformity with the sensible rule that agents are not entitled to any indemnity from their principals in respect of unauthorized expenditures." 1 Wood's Colly. Part., 495.

But we are reminded that the constitution and by-laws of The Union Pork House Company provide, by article XI of the one and article IX of the other, that either the constitution or by-laws "may be altered or amended at any regular meeting by a two-thirds vote of all stockholders represented at said meeting." And it is urged in argument, that notwithstanding article VIII of the by-laws restraining the action of the directors has never been altered or amended, yet, the shareholders, at certain extra but not regular meetings, by a vote sufficient to alter or amend that section, virtually assented to and ratified the acts of the directors in creating an indebtedness beyond the available capital of the company, by authorizing them to borrow money and directing a mortgage on the company's property to indemnify them against loss. But the object of a change in the by-laws is not to be attained by an indirect, irregular, and unauthorized method, calculated to mislead the shareholders. The shareholders had the right to rely upon the inviolability of the constitution and by-laws, unless changed in the manner prescribed. Until

the by-laws to restrict the directors in the expenditure of money should be changed in the mode provided, to wit: by a two-thirds vote of all the stock represented at a regular meeting, of which due notice had been given, and held on the first Thursday of March or September, the directors would be confined within the bounds of the available capital of the company, and in transgressing those bounds, would, we think, be entitled to no contribution or reimbursement from non-assenting shareholders or partners who had paid their subscriptions. If it is proposed to make an alteration in the partnership articles by an agreement which shall be binding on all parties, notice of the proposed change and of the time and place at which it is to be taken into consideration ought to be given to all partners. *Const vs. Harris*, 1 T. & R. 496. For, even if the change is one which it is competent for a majority to make against the assent of the minority, all are entitled to be heard upon the subject; and unless all have an opportunity of opposing the change, those who object to it will not be bound by the others. 2 Lind. Part., 2d Am. Ed., 410.

Recurring, however, to the court's findings of fact in reference to the extra meeting of December 1, 1875, when a resolution was adopted authorizing the directors to finish the building and borrow money to pay off the indebtedness; and the extra meeting of September 26, 1876, when the matter of paying off the indebtedness, and completing the building was considered; and the extra meeting of December 23, 1876, when the trustee was authorized to execute and deliver a mortgage to secure the directors from loss on account of their individual liability on the indebtedness, it does not appear how many shares of stock were represented at any one of those meetings, or whether any resolution was adopted by a two-thirds vote, or whether any notice was ever given to any shareholder, informing him that an alteration or amendment of any of the by-laws would be taken into consideration.

Furthermore, where a member of a firm materially violates the articles of copartnership, and claims contribution and indemnity from his copartners for the losses and expenses to which he has thereby been subjected, it will be incumbent upon him to show assent or ratification of his acts by his copartners before he can recover of them. In the findings of fact it is not disclosed that the plaintiffs in error, or any of them, ever expressly assented to the creation or payment of

any of the indebtedness contracted by the directors. Indeed, the court evidently did not regard such assent necessary to bind the other shareholders. For, the court found, that a stockholder who was never present at any meeting when the indebtedness was made known or talked of, who never attended any meeting after he heard of the indebtedness, and who expressed his dissatisfaction at the creation of the debt; that a stockholder who never attended any of the meetings, never heard of the indebtedness until the commencement of the original action, and never expressly assented to it; and that a stockholder who attended a meeting when the indebtedness was made known, but voted against paying it, and never expressly assented to it, should each, nevertheless, be holden to contribute toward the reimbursement of the directors. The fact that the shareholders received notice of the meetings and failed to attend, seems to have been deemed adequate to bind them. But, the directors having disregarded an important article of the by-laws, essential to the safety and protection of the company, and thereby created an indebtedness beyond the company's available capital, a shareholder who did not see fit, upon notice, to attend a meeting called by those directors to consider their own neglect of duty, should not therefore be concluded by the action of those stockholders present who ratified the unauthorized acts of the directors.

In our view the conclusions of law, and the decree of the circuit court are not altogether sustained by the facts as found by the court; and those of the plaintiffs in error who did not, in any other manner than by failure to attend the meetings of the stockholders when notified, assent expressly or by necessary implication, to the creation or payment of any of the indebtedness incurred by the directors, should not be required to contribute toward the payment of such indebtness, after paying the amount due upon their respective subscriptions. We think, therefore, that a judgment should be rendered for the plaintiffs in error upon the facts found, in conformity with the foregoing opinion of the court.

Judgment accordingly.

NOTE: See Mechem's Elem. of Partn., §§ 125, 126.

# VIII.

## ACTIONS BETWEEN PARTNERS.

### 1. At Law.

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### WYCOFF vs. PURNELL.

*Supreme Court of Iowa, 1860.*

10 Ia. 322.

In February, 1857, plaintiff and defendant formed a copartnership in the grocery and provision business in the city of Keokuk, each of said partners agreeing to furnish his share of the capital stock and share equally in the profits of their firm business. The copartnership thus formed was dissolved in December, 1857. The stock in trade was sold and placed to the credit of plaintiff on the partnership account. The plaintiff in his petition avers that the defendant failed to furnish his share of the capital for the said firm; that he drew out of the said firm more than his just share of the profits, and that upon a settlement and account stated between plaintiff and defendant there was due from defendant to plaintiff the sum of $1,109, for which sum the plaintiff sues. Defendant demurred to plaintiff's petition, which demurrer was sustained by the court and judgment entered thereon, from which plaintiff appeals.

*Noble & Strong*, for appellant.

*Rankin, Miller & Baxter*, for appellees.

Baldwin, J. The defendant demurred to the petition of plaintiff, and assigned as cause of demurrer, that the petition showed that it was a controversy for the settlement of partner-

ship matters, and its subject-matter was one of exclusive chancery cognizance; also that an action at common law would not lie for the matters and things set up in the petition.

It is contended by counsel for appellee that one partner cannot sue another at law for an unsettled account, and that chancery has exclusive jurisdiction of unsettled matters between partners. Upon this point there is no controversy.

But it also claimed by appellant that the principle is fully and clearly settled that one partner can maintain an action at law against his copartner upon an amount found to be due him upon settlement and account stated. We think the current of authorities show this to be the proper and settled rule. While in some courts it has been held that upon a settlement of partnership accounts, an express promise to pay is essential to support an action, yet in most of the states it has been held that where there has been a settlement and balance ascertained, the law itself will imply a promise to pay: Collyer on Partnership, §§ 278, 279, 280, and note; Story Eq. Jur., § 644 and note.

Whether this is a suit at law to recover upon a promise by defendant, either express or implied to pay a balance ascertained to be due upon settlement, or a proceeding to recover an amount unliquidated between partners, must be determined by the language of the petition. It is averred in the petition that the partnership has been dissolved; that the property of the firm had been disposed of, and upon a settlement and account stated, there was due from the defendant to plaintiff the amount claimed in the petition.

We think that the plaintiff shows by his petition, under a fair and natural construction, a cause of action properly maintainable in a court of law. That while the petition is defective in not setting forth fully the character of the settlement of the partnership business, yet it shows also that the partnership was ended; that the account between the plaintiff and defendant, as partners, was no longer a matter of controversy; that the amount sued for had been agreed as due to plaintiff; which, if established by evidence, the plaintiff had a right to recover.

Judgment reversed.

NOTE.—See Mechem's Elem. of Partn., § 199.

As stated by BALDWIN, J., there are some states in which it is said that there must be an *express* promise to pay. Thus, see *Course vs. Prince*, 1

Mill, (S. Car.) 416, 12 Am. Dec. 649; *Murray vs. Bogert*, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; *Chadsey vs. Harrison*, 11 Ill. 151; *Burns vs. Nottingham*, 60 Ill. 531; *Purvines vs. Champion*, 67 Ill. 459; *Nims vs. Bigelow*, 44 N. H. 376. But the general rule is that the promise may be implied. *Wycoff vs. Purnell, supra; Holyoke vs. Mayo*, 50 Me. 385; *Spear vs. Newell*, 18 Vt. 288, *post; Pope vs. Randolph*, 18 Ala. 14; *Wray vs. Milestone*, 5 *Mees. vs. Wels.* 21.

In Massachusetts a still more liberal rule prevails. See *Williams vs. Henshaw*, 11 Pick. 79, 23 Am. Dec. 366; 12 Pick. 378, 23 Am. Dec. 614.

In Michigan, see *Wheeler vs. Arnold* 30 Mich. 304.

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## BULLARD vs. KINNEY.

*Supreme Court of California, 1858.*

10 Cal. 99.

This was an action of assumpsit, brought by the plaintiff on an account assigned to him by Sotzen and Goodnow, for goods, wares, and merchandise sold to the defendants. The defendants composed a joint stock association, known as the "Columbus Quartz Mining Company." While Sotzen and Goodnow, merchants and partners, were shareholders in the company, they sold to the company goods, wares and merchandise to a large amount. They afterwards, and during the existence of the company, sold their stock to one White, and assigned their account against the company to the plaintiff.

There was nothing in the constitution of the company which regulated the remedies of the shareholders, as between themselves. Nor was there any final settlement of the partnership accounts, or any balance struck, or promise on the part of the shareholders to pay this account. The plaintiff commenced his suit by attachment against the property of defendants.

The defendants had judgment in the court below, and the plaintiff appealed.

*Sanderson* and *Howes*, for appellant.

*D. K. Newell*, for respondent.

BURNETT, J. The only question arising in the case is, whether the plaintiff can sue in this form?

There was nothing in the constitution of this company which regulated the remedies of the shareholders, as between themselves, and, therefore, the general law of partnership must prevail (Coll. on Partn., Sec. 1115). There having been no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount to Sotzen and Goodnow, they could not maintain assumpsit. As they could not sue, it is difficult to see how their assignee could do so. To permit a partner, who has a claim against the firm, and who cannot, therefore, sue the firm at law, to avoid this disability by assignment of the debt, would defeat all the substantial reasons upon which this rule is predicated. This rule rests upon three grounds:

1. The technical ground, that a man cannot, at the same time, in the same suit, be both a plaintiff and a defendant.

2. Because it would be useless for one partner to recover that which, upon taking a general account, he might be compelled to refund; and thus a multiplicity of suits be permitted, where one would answer.

3. The contrary rule would defeat the equitable right of the other partners to set-off their advances against those of plaintiff, and would force them to first pay the amount, and then rely upon the individual responsibility of the partner for a return of his proportion.

The first ground, being merely technical, may be considered as not so material under our system of pleading; but the other two grounds are substantial in their character. * * *

Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 130, and cases there cited.

## MANGNELS vs. SHAEN, *et al.*

*App. Div. of Sup. Ct. of New York 1897.*

21 App. Div. 507.

The facts appear in the opinion.

*G. E. Waldo* for plaintiff.

*Charles Edward Souther* for defendants.

RUMSEY, J.:

It appears from the complaint that for some time before the 1st of January, 1889, Henry B. Shaen, Frederick B. Stewart and Frederick M. McWilliams, the defendants in this action, were copartners doing business in the city of New York under the firm name of H. B. Shaen & Co ; that the same Harry B. Shaen and Frederick B. Stewart, with one Nathan Phipps, were between the 1st of January, 1889, and the 1st of October, 1889, a copartnership under the same name, that the last-named firm at the request of the defendants and in liquidation of the business and debts of the old firm paid for their use the sum of thirty thousand and odd dollars, which the defendants promised to repay to the new firm.

About the 15th of October, 1889, the firm composed of Shaen, Stewart and Phipps made a general assignment to the plaintiff, who took by virtue thereof the claim against the old firm, and this action is brought upon that claim. The defendant McWilliams alone interposed a defense. The case came on for trial at the Trial Term. The complaint was dismissed upon the pleading for the reason that no cause of action was stated therein, because the plaintiff sued as assignee of three individuals who composed a partnership and the defendants are the same three, with one exception, the court at Trial Term holding that where the same person was a member of two firms, one of those firms could not sue the other firm for the recovery of a debt which the plaintiff firm owed to the defendant firm. The sole ground of dismissal was that this action could not have

been maintained by the creditor firm or its assignee against the debtor firm, for the reason that some of the members of each firm were the same persons. In this contention the defendant and the learned trial court were entirely mistaken as is well settled by authority in this State.

In *Cole vs. Reynolds*, (18 N. Y. 74) the same question was presented, where the action was brought upon the original balance due from one firm to the other, although certain of the members of each firm were the same persons. It was held by the Supreme Court that the action could not be maintained; but the judgment of this court was reversed by the Court of Appeals, the court holding that, under the rule established by the Code, the action could be maintained and it was erroneous to dismiss the complaint. The same question was presented to the General Term in the first department in the case of *Schnaier vs. Schmidt* (13 N. Y. Supp. 725) where the action was tried as an action at law without any objection, as was the case here. The plaintiff firm had a judgment against the defendant, and upon appeal the judgment was affirmed, the court holding that there was a cause of action and that the action could be maintained.

These two cases sufficiently show that it was erroneous to dismiss the complaint in this action.

The decision of the judge at Trial Term, therefore, in any aspect of the case, was erroneous, and the exceptions should be sustained and the motion for a new trial granted, with costs to the plaintiff to abide the event of the action.

VAN BRUNT, P. J., BARRETT, WILLIAMS and PATTERSON, JJ., concurred.

Exceptions sustained, new trial ordered, costs to plaintiff to abide event.

NOTE.—See Mechem's Elements of Partn., § 147.

## COLE, *et al.* vs. REYNOLDS, *et al.*

*Court of Appeals of New York, 1858,*

18 N. Y. 74

D. D. Cole, Holmes and W. J. Cole were partners under the firm name of Cole & Holmes. W. J. Cole was a partner with others in a firm of Cole, Stevens & Co. The latter firm was indebted to the former for a large sum on account stated.

D. D. Cole and Holmes bring an action thereon and W. J. Cole declining to become a party plaintiff was made defendant as provided by the Code.

Defendants insisted that this action at law could not be maintained but that there must be an accounting.

From a judgment for defendants plaintiffs appealed.

*James Gibson* for appellants.

*Potter* and *Tanner* for respondents.

HARRIS, J. By the Code, the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depend upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction.

But while this is so in reference to the form and course of proceeding in the action, the principles by which the rights of the parties are to be determined, remain unchanged. The Code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If under the former system a given state of facts would have entitled a party to a decree in equity

in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the Code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment. The question therefore is, whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the Code, have sustained an action at law or a suit in equity.

The defendants' firm are indebted to the plaintiffs' firm upon an account stated and settled between them. This fact, standing alone, would have entitled the plaintiffs to maintain an action at law. But there is another fact in the case, which upon a technical rule peculiar to the common law, would have defeated such an action. One of the individuals composing the plaintiffs' firm is also a member of the defendants' firm. A man cannot sue himself; and as, at common law, all the members of a firm must unite in bringing an action, it follows that in such a case no action at law could be sustained.

But in equity this technicality does not stand in the way of justice. It is enough, there, that the proper parties are before the court. They may be plaintiffs or defendants, according to circumstances, but, being before the court, it will proceed to pronounce such judgment as the facts of the case require. This latter rule is obviously the dictate of common sense. So far as I know, it prevails everywhere else except at the common law.

Indeed, equity, like the law of Scotland and the systems of continental Europe, goes farther, and treats the copartnership as a distinct existence, having its own distinct rights and interests. "In all such cases," says Story, "courts of equity look behind the form of the transactions to their substance, and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies." (1 Story's Eq. Jur., § 680; Story on Partnership, § 235.)

There is no difficulty, therefore, growing out of the fact that one of the parties is a member of both firms, in sustaining this action. How, then, can it be defeated? The fact that, upon

a settlement between the two firms, it was agreed that the balance now claimed by the plaintiffs was due from the defendants' firm to the plaintiffs' firm is scarcely denied in the answer, and, upon the trial, the plaintiffs offered to prove it. The indebtedness, therefore, for the purposes of this decision, must be assumed. The amount claimed must be regarded as *ex aequo et bono*, due from the defendants' firm to the plaintiffs' firm. Its payment would constitute a final adjustment of all the transactions between the two firms. Why then should not the plaintiffs be allowed to recover it?

In the view taken by the court below, it was necessary to have an accounting in order to determine the rights of the parties. But it is to be remembered that, as between the two firms, an accounting has already been had. What other accounting did the court below contemplate? Shall it be between the several members of the plaintiffs' firm or the several members of the defendants' firm? In short, what must the plaintiffs do, more than they have done, to entitle themselves to recover the acknowledged indebtedness of the defendants to their firm?

Had it been set up as a ground of defense that, as between the plaintiffs' firm and the partner who is made a defendant, the state of accounts was such that it would be inequitable to require this debt to be paid, such a defense might have rendered an account necessary in order to determine the equitable rights of the parties. Even then, I suppose, the better doctrine would be to let the debtor firm pay its debt, and the creditor firm, after receiving their debt, adjust their individual equities among themselves. This would seem to be more in accordance with the common sense of the commercial world, and the rule of equity which treats a copartnership firm, for the purposes of a trial, as an artificial body, a *quasi* corporation.

Upon the whole, I am of opinion that the case stated by the plaintiffs, and which, upon the trial, they offered to prove, was sufficient, *prima facie*, to entitle them to recover. If, upon another trial, the defendants shall be able to present a state of facts which renders it necessary that an account should be taken between the different members of either firm, to enable the court to determine whether the amount claimed is equitably due from the defendants to the plaintiffs' firm, it will be entirely competent for the court to direct that such an accounting be

had. But no such defense would be admissible under the present state of the pleadings.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PRATT, J., dissented; SELDEN, J., expressed no opinion, all the other judges concurring.

Judgment reversed and new trial ordered.

NOTE:—See Mechem's Elements of Partn., § 147. See also 5 Am. L. Rev. 47; *Rogers vs. Rogers*, 40 N. Car. 81; *Burrows vs. Leech*, 116 Mich. 82.

## CARPENTER vs. GREENOP.

*Supreme Court of Michigan, 1889.*

74 Mich. 664, 42 N. W. Rep. 276, 16 Am. St. Rep. 662.

Action by Charles D. Carpenter against John Greenop and Lavery upon a promissory note.

Judgment was given for defendants, and plaintiff appeals.

*Glidden & Bates*, for appellant.

*M. Brown* and *Frank Dumon*, for respondents.

CAMPBELL, J. Plaintiff purchased in good faith, but after maturity, a note of John Greenop & Co., payable to the order of Robert A. Lavery, and indorsed by Lavery. Lavery was a member of the firm of John Greenop & Co., and made the note, with Greenop's consent, for money lent by Lavery to the firm. The note was dated January 21, 1883, payable in six months. It was transferred to plaintiff in 1884 while the firm was still in business, and about a year before it ceased doing business. There was no evidence of the state of accounts, or that Lavery was in any way a debtor to the firm when the transfer was made, or that there were any equities existing against him which did not exist when the note was made. The court below held that plaintiff could not recover. The reason assigned was that the note could not be transferred after maturity, so as to enable the indorsee to sue upon it, if suit could not have been brought by the assignor, and that Lavery could have brought no suit on it. The decision also seems to have been based partially on the idea that a partner can have no dealings with his firm which are not subject to the final accounting, and that the equities of such an accounting attach to such claims as he may hold against the firm.

I do not think this doctrine is tenable. It certainly has not been directed in this court. The only case that is seriously claimed as bearing in that direction is *Davis vs. Merrill*, 51 Mich. 480, 16 N. W. Rep. 864. That case has no resemblance to this. One member of the firm, named Eastwood, received from the firm in October, 1874, a note due in one month after

date. In 1875 the firm was dissolved, and the affairs were put into the hands of George W. Merrill, one of the partners, to wind up. Merrill's credit in the firm accounts was larger than Eastwood's, and Eastwood had been credited on the books with the amount of the note, which had never been presented or demanded during the period after dissolution. In May, 1881, Eastwood, who had lost the note by accidental fire in January of the same year, assigned to the plaintiff in general terms whatever claims he had against the firm, with no reference to the note as such. It is plain enough that there could have been no recovery in such a case. Even had the note been described, the statute does not authorize the assignee of a negotiable note, who is not an indorsee, to sue in his own name on it. But, furthermore, there was no attempt to transfer the note as such. The assignment was one which transferred nothing but Eastwood's claims generally against the company, and must therefore be subject to the partnership settlement. There was no firm in existence for nearly six years before the assignment. In the present case the note was transferred by regular indorsement a considerable time before the firm went out of business. It was due already as an independent claim against the firm for money lent, and not for money invested in the business. It was not by its terms, or by the nature of the transaction, to be postponed until the future dissolution of the concern, and there is no accounting in advance of dissolution, unless by agreement.

While there is a difficulty in a suit at law in the name of a party against himself, yet, if this is the only difficulty, it goes only to the form of the remedy, and not to its existence. There never was any legal or equitable reason why a partner should not have specific dealings with his firm as well as any other person; and unless those dealings, from their nature, are intended to go into the general accounting, and wait for their adjustment till dissolution, they give a right to have a remedy according to their exigency, and can be dealt with like any other claims. The only reason why they must, under the old practice, be prosecuted at equity instead of at law, arose from the necessity at law of having plaintiffs capable of suing the defendants. In such a case the failure of a remedy at law justified a resort to equity. But equity could grant relief in such cases, and under our present rules there can be no dif-

ficulty at law. Where partners have seen fit to deal with each other without reference to the final accounting, the transaction is not subject to the necessity or delay of such an accounting.

This note was by its terms negotiable. It is elementary doctrine that negotiability does not cease when paper matures. It is only subject to such equities as exist against the paper at the date when it is negotiated. And the equities which affect the indorsee are only such as attach directly to the note itself, and do not include collateral matters. This is very old doctrine, and is laid down without qualification. Lord TENTERDEN and his associates, speaking through Mr. Justice BAYLEY in *Burrough vs. Moss*, 10 Barn. & C. 558, refer to the subject in this way: "This was an action on a promissory note, made by the defendant, payable to one Fearn, and by him indorsed to the plaintiff after it became due. For the defendant it was insisted that he had a right to set off against the plaintiff's claim a debt due to him from Fearn, who held the note at the time when it became due. On the other hand, it was contended that this right of set-off, which rested on the statute of set-off, did not apply. The impression on my mind was that the defendant was entitled to the set-off, but, on discussion of the matter with my Lord TENTERDEN and my learned brothers, I agree with them in thinking that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters. The consequence is that the rule for reducing the damages in this case must be discharged." See Chit. Bills, 244-246; Story, Bills, § 220; *Leavitt vs. Putnam*, 3 N. Y. 494, 53 Am. Dec. 322; *Baxter vs. Little*, 6 Metc. 7, 39 Am. Dec. 707; and cases in note to page 275 of Bigelow's Leading Cases; 3 Kent Comm. 91, and notes.

It was not shown, and cannot be claimed on this record, that there was any unfairness or want of consideration, or payment, or any other matter bearing on the note in this case, when it was transferred, and in such case it can make no difference when it was transferred. It continued to be a valid note, and capable of transfer by indorsement. That a partner himself may have a remedy of some kind, where the transaction is such as to be separated from the general partnership accounting, does not seem to be questioned. Mr. Collyer

refers to several illustrations, in book 2, c. 3, Partn. (2d Ed.) Judge STORY, in his work on Partnership, § 222 *et seq.*, indicates very clearly the right of a partner to relief in the case of contracts as a creditor or otherwise with his firm; and the fact which is referred to in all the books, that an accounting can only be had at the close of the business, indicates as clearly as anything can that either a partner can make no separate contract with his firm at all, or else there must be some means of enforcing it. A contract which cannot be enforced is nugatory. Partnerships are often made for long terms of years. Members become managers on salaries which are payable at regular intervals, and they frequently furnish articles for which they are entitled to pay. No one doubts their right to pay themselves out of moneys in their charge; but all do not have this opportunity, and to hold that a person must, if his copartners will not advance him what is due, wait the whole term of business for payment, is not reasonable or maintainable. A very thorough discussion of the various questions is found in the early case of *Smith vs. Lusher*, 5 Cow. 688, where the judges of the supreme court, and the chancellor and other members of the court for the correction of errors dealt with the subject in a very exhaustive way, with entire unanimity. The cases of *Nevins vs. Townsend*, 6 Conn. 5, and *Gray vs. Bank*, 3 Mass. 364, 3 Am. Dec. 156, are also somewhat pertinent. I have found no authority which sanctions the doctrine that plaintiff was precluded by the fact that the note was past due from taking the title by indorsement, and none that allows a note to be affected by collateral equities. When this note was indorsed there could be no accounting, because the firm continued its ordinary business. The debt was for a loan, and not for investments in the capital. It was distinct from the mutual relations among the partners, and stood as a separate contract. I think there was nothing to bar recovery, and that the judgment to the contrary should be reversed.

CHAMPLIN, LONG, and MORSE, JJ., concurred.

SHERWOOD, C. J., dissented.

NOTE.—See also Mechem's Elem. of Partn., §§ 180, 181, and cases there referred to.

See also *Wintermute vs. Torrent*, 88 Mich. 555, 47 N. W. 358.

## BEEDE vs. FRASER.

*Supreme Court of Vermont, 1894.*

66 Vt. 114, 28 Atl. Rep. 880, 44 Am. St. Rep. 824.

The court below found the following facts: Prior to October 15, 1891, the plaintiff and one George were copartners, under the firm name of George & Beede, in the business of quarrying and selling granite at Barre, and the defendants, as copartners under the firm name of P. B. Fraser & Co., were engaged in manufacturing granite into monuments, etc. The former partnership was dissolved about September 1, 1891. Prior to that time, it had sold and delivered to the defendants a quantity of granite, for which the defendants owed George & Beede; and the debt, by the contract of dissolution, became the property of Beede. The defendants were so notified before this suit was brought, and thereupon promised to pay the plaintiff the amount of said debt, and afterwards did pay him $50, leaving a balance due of $4.62. October 15, 1891, the plaintiff and defendants entered into copartnership under the firm name of Beede & Co.; and that firm carried on the business of quarrying and selling granite, and prior to December 4, 1891, sold the defendants granite to the amount of $90, which was due from the defendants to Beede & Co. on that date, when the firm of Beede & Co. was dissolved. The firm of Fraser & Co., composed of Fraser and Smith, owed the $90 to the other firm, which was composed of Beede, Fraser, and Smith. The plaintiff was not a member of the defendant firm. The court found that as a part of this contract of dissolution the plaintiff became the owner of all debts due to Beede & Co., and that concurrently with the making of the contract the defendants promised the plaintiff to pay him the demand of $90, but it certifies that these facts were found solely from Paper A, which is as follows: "This is to certify that the copartnership heretofore existing by and between F. A. Beede, P. B. Fraser, and G. W. Smith, all of Barre, in the county of Washington, and state of Vermont, under the firm name and style of Beede & Company, is hereby dissolved by mutual

agreement. And it is further agreed by and between said Beede, Fraser, and Smith that the said F. A. Beede is to, and hereby agrees to assume and pay all of the debts of the said firm, and to have and collect all of the debts due and owing said firm. Witness our hands and seals, and dated at said Barre this fourth day of December, 1891. F. A. Beede [L. S.], P. B. Fraser [L. S.], G. W. Smith [L. S.]."

There was a judgment for the plaintiff and defendants appealed.

*Martin & Slack*, for plaintiff.

*J. W. Gordon* and *E. W. Bisbee*, for defendants.

TYLER, J. Before the dissolution the defendants owned the demand jointly with the plaintiff, and Beede & Co. could not have maintained an action upon it against the defendants, because Fraser and Smith would have been both plaintiffs and defendants, and "no one can be interested as a party on both sides of the record." Where two companies are composed in part of the same individuals, no action at law can be maintained by one against the other. *Green vs. Chapman*, 27 Vt. 236, citing *Mainwaring vs. Newman*, 2 Bos. & P. 120, and *Bosanquet vs. Wray*, 6 Taunt. 597; Dicey, Parties, rule 22. It is a general rule that all the partners must join as plaintiffs in an action at law to enforce a partnership claim, whether the action is brought before or after the dissolution of the partnership. Therefore, two partners cannot maintain a suit against a third to recover for goods charged to him on the partnership books, although by the contract of dissolution the two were to have all the debts due the firm, there being no promise by him to pay the other partners. *Judd vs. Wilson*, 6 Vt. 185. One partner cannot recover of another an unliquidated and unsettled balance of a partnership business. *Spear vs. Newell*, 13 Vt. 288. But when, on the dissolution, one retained a portion of the partnership assets sufficient to pay a particular partnership debt, and agreed with his copartner to pay it, and the copartner was afterwards obliged to pay it, it was held that he could recover in assumpsit the amount so paid. *Hicks vs. Cottrill*, 25 Vt. 80. As a rule, assumpsit will not lie by one partner against his copartner, in respect to any matter connected with the partnership transactions, or which would

involve the consideration of their partnership dealing. Yet one may sustain an action against his copartner on an express contract or covenant to do, or omit any particular act not involving any question as to the general accounts. And when the parties by an express agreement separate a distinct matter from the partnership dealing, and one expressly agrees to pay the other a specified sum for that matter, assumpsit will lie on the agreement, though the matter arose from the partnership dealing. *Collamer vs. Foster*, 26 Vt. 754. "It is quite clear," says T. Parsons on Partnership (section 190), "that certain particular and distinct transactions may be separated from the affairs or business of the partnership, by the agreement of the partners. Then, those persons who are concerned in this separated matter are not as partners to each other, although in all other business relations they remain partners." Where partners agree to divide a partnership debt, and the debtor assents to it, and promises one of the partners to pay him his moiety, such partner may maintain an action for his moiety against the debtor. 1 Lindl. Partn. 265, citing *Blair vs. Snover*, 10 N. J. Law, 153. After a dissolution, and a balance has been struck and agreed upon by the partners, one may maintain assumpsit against the other to recover his balance upon an implied promise. *Spear vs. Newell*, 13 Vt. 292, *post*, *Warren vs. Wheelock*, 21 Vt. 323; *Gibson vs. Moore*, 6 N. H. 547; *Wilby vs. Phinney*, 15 Mass. 121; *Wheeler vs. Wheeler*, 111 Mass. 247. Assumpsit lies where, after dissolution and settlement, one partner received more than was his due. *Bond vs. Hays*, 12 Mass. 34; *Clark vs. Dibble*, 16 Wend. 601.

(Omitting a discussion in which the court held that general assumpsit was a proper action.)

Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 134, 162.

## HILL VS. PALMER.

*Supreme Court of Wisconsin, 1882.*

56 Wis. 123, 13 N. W. Rep. 20, 43 Am. Rep. 703.

Hill and Briggs sued Palmer alleging that in September, 1877, it was agreed that these three should enter into a partnership for the purpose of lumbering on the lands of Cline; that the contract with Cline was to be made in Palmer's name alone but for the benefit of the proposed firm; that Palmer made the contract with Cline, but then refused to recognize any interest in plaintiffs and excluded them from participation, whereby they lost the profits which would have accrued to them. Palmer demurred and demurrer sustained.

*Bump, Hetzel & Cannon* and *Patchen & Weed*, for appellant.

*Charles W. Felker*, for respondent.

LYON, J. Counsel agree that the learned circuit judge sustained the demurrer to the complaint on the ground that the facts therein stated show that the parties were partners in the contract with Cline, and in the execution thereof, and that the only remedy of the plaintiffs is by an action in equity for an accounting and settlement of the partnership affairs.

The question to be determined is, does the complaint state facts which constitute a cause of action at law for the recovery of damages, or must the plaintiffs resort to an equitable action for relief? It is a fairly debatable question whether it appears from the complaint that the agreement between the parties in respect to the copartnership was anything more than an executory agreement to enter into a partnership in the future, which was never executed. The agreement alleged is not in terms that the parties thereby formed a copartnership, but that "it was agreed that the said parties should enter into a copartnership" for the purposes therein specified. The breach of such agreement alleged in the complaint is that the defendant "refused to comply with the conditions thereof by refusing to enter into or carry out said partnership." But, however this may be, it seems clear that if any copartnership ever existed between these parties it commenced when the agreement between Cline and the defendant was executed. Giving to the complaint the most favorable construction for the defendant of which it will admit, we think that the agreement therein alleged is, in substance and effect, that if the defendant should succeed in making a contract with Cline which should be satis-

factory to the plaintiffs, to cut, log and run Cline's timber, then the parties should become partners in that enterprise on the terms and conditions stipulated between them.

In that view of the case there may have been a time when a copartnership actually existed between the parties, but it was immediately terminated by the wrongful act of the defendant (so far as he could terminate it) and no business was transacted—nothing whatever was done by the parties as partners. The defendant excluded the plaintiffs from all participation whatever in his contract with Cline as soon as it was made, and they had no part in the performance thereof. By such wrongful act the defendant refused to launch the partnership business, and thus rendered the copartnership inoperative for the purposes for which it was formed. There is no doubt whatever that an action at law may be maintained by a party to an executory contract to form a future copartnership to recover damages for a wrongful refusal by the other party to execute such agreement. It is also well settled that the wrongful refusal by a party to a contract of copartnership to permit the firm to commence business, or as it is sometimes termed, to launch the partnership business, is ground for an action at law by the injured partner to recover damages of the partner whose wrongful act has defeated the purpose for which the copartnership was formed. The cases which so hold, both in England and this country, are very numerous. Indeed, the authorities seem to be quite uniform in so holding. The following are a few of the cases referred to: *Venning vs. Leckie*, 13 East 7; *Gale vs. Leckie*, 2 Stark. 107; *Manning vs. Wadsworth*, 4 Md. 59; *Glover vs. Tuck*, 24 Wend. (N. Y.) 153; *Bagley vs. Smith*, 10 N. Y. 489, *post; Terrill vs. Richards*, 1 Nott. & McC. (S. Car.) 20; *Ellison vs. Chapman*, 7 Blackf. (Ind.) 224; *Williams vs. Henshaw*, 11 Pick. (Mass.) 79; 22 Am. Dec. 366; *Adams vs. Totten*, 39 Penn. St. 447; *Vance vs. Blair*, 18 Ohio 532, 51 Am. Dec. 467; 1 Story Eq. Jur. Sec. 665; Collyer on Part. Sec. 245; 2 Lindley on Part. (4th Ed.), 1025, and cases cited in notes. The subject is much discussed in some of the above cases and many other cases asserting the same doctrine are cited in the opinions as well as in the above text-books.

The test seems to be that if the damages resulting from a breach of a covenant or stipulation in the partnership agreement by one partner belong exclusively to the other partner,

and can be assessed without taking an account of the partnership business, covenant or assumpsit may be maintained by the injured partner against the other for such damages. Here no partnership business was transacted; hence no account could be taken, and the damages claimed belong to the plaintiffs. This principle was applied in *Sprout vs. Crowley*, 30 Wis. 187. Should it be conceded that by the alleged agreement of September, 1877, the parties became partners, this action can still be maintained under many of the cases cited above. This court has frequently held that one partner has no claim against his copartner individually (that is to say, he cannot maintain an action at law against such copartner), on account of partnership transactions, although a final settlement of the affairs of the firm would show a balance in his favor. *Tolford vs. Tolford*, 44 Wis. 547, and cases cited. But it has not held that if one partner, immediately after the contract of copartnership is made and before anything has been done under it, wrongfully repudiates the contract and prevents the firm from ever doing any business under it, the injured party cannot maintain an action at law against his copartner and recover the damage which he has suffered thereby.

In *Tolford vs. Tolford, supra*, and also in *Lower vs. Denton*, 9 Wis. 268, an accounting was necessary in order to determine the damages or compensation to which the plaintiff was entitled. These were actions at law. The same is true of *Wood vs. Beath*, 23 Wis. 254, which was a suit in equity.

It follows from the foregoing views that the complaint states a valid cause of action at law.

Judgment reversed.

ORTON, J., dissented.

NOTE—See Mechem's Elem. of Partn., § 138.

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## BAGLEY vs. SMITH.

*Court of Appeals of New York, 1853.*

10 N. Y. 489, 61 Am. Dec. 756.

Appeal from a judgment of the New York superior court for damages for breach of articles of copartnership. The agreement was in writing and under seal, and provided for a

continuance of the firm for a term of four years and one month from December 1, 1846. Before two years had quite expired, two of the partners, while the third was traveling in the west on business of the firm, published a notice of dissolution of the old firm, and of the formation of a new one in their own names to continue the business. They took possession of the stock, and commenced business, according to their announcement. This suit was brought by the ousted partner for damages for this wrongful dissolution; and resulted in a verdict and judgment for plaintiff, subject to exceptions taken by defendant, which raised the questions discussed in the following opinion.

*Daniel Lord*, for the appellants, who had dissolved the firm.

*John Slosson*, for the respondent, the ousted partner.

JOHNSON, J. The principal points presented by the exceptions in this case are: 1, Whether an action can be maintained for a breach of a covenant to continue a partnership for a fixed period, unless sooner dissolved in accordance with the terms of the covenant; 2, Whether actual damages can in such case be recovered; 3, Whether expected profits can be regarded as ground for damages in such a case, and 4, whether the amount of profits made prior to the dissolution could be considered by the jury as bearing, in any degree, upon the amount of damages to which the plaintiff was entitled. Another objection was presented on the argument, that the covenants of the defendants being several, no judgment for joint damages could be given. This objection, not having been presented at the trial, so far as the bill of exceptions informs us, cannot be considered here.

There do not seem to be any special rules of law applicable to covenants contained in partnership articles and not to other covenants; and we may therefore say, without discussion, that an action will lie for a breach of covenant, no matter in what instrument the covenant be found. We may further affirm that no rule of law declares that the breach of a covenant contained in partnership articles shall be compensated only by nominal damages. The measure of damages must depend on the nature of the obligation, and the extent of the injury in this as in all other cases of broken covenants.

No question was made at the trial as to the sufficiency of the proof that a breach of the obligation to continue the partnership had taken place, except only so far as a question of that sort is raised by the objection of the defendants' counsel, that by the constitution of the partnership the partners have a power of revocation whenever they lose confidence in each other. It is not quite clear whether this objection points to the particular frame of this partnership, or is supposed to be founded upon the general rules applicable to that relation. If it relate to the provisions of the partnership agreement in this case, then it is clear that the articles contain no clause which warrants the defendants' proposition. If, on the other hand, the general law of partnership is referred to, while it must be conceded that some difference of opinion seems to exist as to the power of either partner in a partnership for a fixed term, contrary to his agreement, to put an end to the continuance of the firm at his own mere will, it can be safely affirmed that, conceding this power to exist in the broadest form, it has never been pretended that a partner who should, in contravention of his agreement, put an end to the partnership would not be held responsible for the injury thus committed.

We are left, then, to the only substantial question which this case presents: Whether the loss of those profits which the plaintiff would have made during the stipulated term of the partnership is a proper subject of compensation, and whether the evidence of past profits, during the period next preceding the dissolution, can be considered as bearing upon the question of prospective profits. The form of the exceptions taken concede that the judge committed no error, unless in taking the profits into consideration at all; that if he was correct in this he has annexed to his instructions all the proper qualifications to prevent an excessive and erroneous estimate of the amount of compensation for prospective profits.

The object of commercial partnership is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party, it is idle to say that

any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of the profits lost one of the common measures, of the damages to be given upon a breach of contract. I need only refer to *Masterton vs. Mayor, etc. of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38]. So, too, in *Wilson vs. Martin*, 1 Denio 602; *Heckscher vs. McCrea*, 24 Wend. 304; and *Shannon vs. Comstock*, 21 Id. 457 [34 Am. Dec. 262], what the party would have made, in other words, his prospective profit, from the performance of the contract was held to be the true measure of damages. I refer also to two English cases on the question, although the English courts do not seem so carefully to have considered the rules by which, as matter of law, damages are to be measured as the courts of this country.

*Gale vs. Leckie*, 2 Stark. 107, was at *nisi prius* before Lord ELLENBOROUGH. The defendant agreed, as author, to furnish a manuscript work to plaintiffs, to be published at their expense, and the profits to be equally divided. The defendant failed to fulfill, and this action was brought for damages. Lord ELLENBOROUGH told the jury the plaintiffs were entitled to their expenses of paper and printing, and added, "the sum of ninety pounds has been stated by the witnesses as the amount of profit which would probably have been derived from the first edition; and it is doubtful whether it would have reached a second;" after suggesting that there might have been a loss instead of profit, which would have been wholly the plaintiffs' loss under the contract, he submitted the matter to the jury, who found for the plaintiffs fifty pounds more than the expenses, etc., for loss of profit. The case does not appear to have been moved afterwards.

*McNeil vs. Reid*, 9 Bing. 68, was an action upon a contract, by the defendant, to take the plaintiff into a firm of which the defendant was a member. It appeared, upon the trial, that the plaintiff had been offered, upon certain terms, the command of an East India ship for a double voyage; that the value of such voyage to the captain was not less than one thousand pounds; that the plaintiff had been induced by the defendant to give up this voyage to enter into the promised partnership. The jury found five hundred pounds for the plaintiff. It was objected, among other things, that the jury were wrongfully instructed as to the damages. On this point TINDAL, C. J.,

says: "I told the jury that they might see that the plaintiff considered the engagement equal to an Indian voyage, because he would not otherwise have relinquished it, and the defendant could not have estimated it at less, because he made his offer as a friend of the plaintiff." It was the value of the engagement as partner, therefore, which the jury were to estimate; and BOSANQUET, J., says: "The damages were estimated according to what the jury thought was the value of the contract. The value of the East India voyage has not been recovered as special damage, but has been taken as an ingredient for estimating the value which each party set on the proposed contract of partnership." In each of these cases the prospective profits of a joint undertaking unperformed was made the subject of compensation in damages in an action at law.

The next question relates to the admission of the evidence of the amount of past profits, to be considered by the jury as bearing upon the future profits. It will be observed that the objection does not at all relate to the mode of proof, but only to the competency of the fact. It seems to me quite obvious that, outside of a court of justice, no man would undertake to form an opinion as to the prospective profits of a business without in the first place informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of a tribunal called upon to determine conjecturally the amount of prospective profits than proof of the nature of the business, or any other circumstance connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of the past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary.

Another question arises upon the defendant's third request to charge, viz.: "That supposing Bagley to be accountable through want of diligence, that should be taken into view in diminution of the damages." An issue had been formed upon

the pleadings, and tried, whether Bagley had fraudulently abstracted a quantity of gold from the firm, and the judge had instructed the jury that if they found this issue for the defendants, then they were justified in dissolving the partnership, and the plaintiff could not recover damages. No issue had been made as to negligence on Bagley's part, nor did the evidence tend to the proof of such negligence; and on these grounds, as well as because the request was not in such a shape, even conceding it to have been well founded upon the evidence, as to require the judge to comply with it, we think the exception not well taken. A request must be in such form that the judge may properly charge in the terms of the request as made, without qualification, or his refusal will not be ground of error. If made, as requested here, the effect would have been to submit to the jury to find whether Bagley was accountable through want of diligence, without any instructions as to what sort of diligence he was bound to exhibit, or what sort of losses or other mishaps he was thus to be made accountable for. In this refusal there was no error.

It may be proper to notice briefly the proposition that the plaintiff's claim for profits must be limited to the period between the dissolution and his subsequent entry into business. This is obviously unfounded. The only question which could be made as to this part of the case is, whether the defendants, in mitigation of damages, could show that the plaintiff either was or might have been as profitably employed in business on his own account as he would have been had the firm business been continued. The plaintiff might, perhaps, have disputed the competency of such evidence. But surely the defendants can not be heard to say that the plaintiff was bound to remain idle at their expense, or lose his claim upon them altogether from the moment when he engaged in business.

Judgment affirmed.

NOTE.—See Mechem's Elem. of Partn., § 137.

## 2. IN EQUITY.

### SPEAR vs. NEWELL.

*Supreme Court of Vermont, 1841.*

18 Vt. 288.

**Bill in equity, for accounting and settlement of a partnership.**

Spear, Carlton and Newell entered into partnership for the manufacture and sale of paper. Spear and Carlton owned one-half interest and Newell the other half. Spear and Carlton were to manage the business, sell the product, and collect the receipts, and the profits or losses were to be divided according to their interests. The business resulted in a large loss, and Spear and Carlton brought an action of account against Newell in the United States Circuit Court, to recover half of the loss, but that court held that, as the defendant had never received any of the partnership effects, no action of account could be sustained against him, and that the only remedy was by bill in equity. They then filed the bill, but the court below dismissed the bill. Complainants appeal.

*C. Linsley* and *E. A. Ormsbee*, for complainants.

*R. Pierpoint* and *E. N. Briggs*, for defendant.

COLLAMER, J. These parties were copartners, the orators being jointly interested in one-half of the partnership, and the defendant in the other. The orators were the active partners, the recipients of all the property and avails of the concern; but, it being an unprofitable and losing concern, there is a balance due the orators from the defendant, and to ascertain this balance, which has not been done, and to close the concern and recover this balance, this bill is filed.

The articles of copartnership were not under seal, and therefore no action of covenant can be maintained. That an action of assumpsit cannot be maintained at law by one partner

against another to recover an unliquidated and unsettled balance of a copartnership business, has been too fully and frequently decided to be considered open to discussion. Gow on Partnership, 98; Collyer on Partnership, 143, 144. If, after a dissolution, a balance is struck and agreed upon by the parties, assumpsit may be maintained to recover it, on an implied promise to pay. I Holt's R. 368. Different rules have been adopted in different states whether there must be an *express* promise to pay the balance; yet, all concur that it is only when the final balance has been adjusted that assumpsit can be maintained. Collyer on Partn., 153, note 45. [See also *Wycoff vs. Purnell*, *ante*, and note.] To this rule, Massachusetts stands alone an exception. There, in the absence of a chancery jurisdiction, the court of law has gone further than other court of mere common law jurisdiction; probably influenced by the pressure of a necessity which does not here exist.

It has been fully settled in an action of account between these parties that these orators, who were the active partners and received the whole property and avails of the copartnership, cannot maintain, at law, an action of *account* against the defendant to recover the balance of losses. It follows that the orators are *without remedy at law*, and are therefore compelled to resort to chancery to adjust the balance of the concern, and to recover of the defendant his proportion of the loss when so ascertained. The mere statement of the case shows the necessity of the bill, and shows too that it is not a mere bill for an account which could be sustained at law. It is true that, in matters of account, generally, chancery has concurrent jurisdiction with the courts of law; and where the defendant is pursued in chancery for an account in any capacity in which he could be pursued at law, a bill will not be sustained where an action would not be. But in this case the bill is not addressed to the concurrent, but to the peculiar and exclusive, jurisdiction of the court of chancery, in a case where the orators have a just claim but are without a remedy at law. It is not a bill calling on the defendant to account. He has received nothing, and of course had no account to render. It is a bill to settle and adjust a mutual account between the parties of a copartnership transaction, which the defendant *will not* settle and which the law *cannot*.

(Omitting the consideration of a plea of the statute of limitations.)

Decree of the court of chancery reversed, plea disallowed, and the cause ordered to pass to the court of chancery to take an account, settle and adjust the same, and ascertain the balance, and decree the same to the party to whom it shall be found due.

NOTE.—See Mechem's Elem. of Partn., §§ 153, 154.
Compare with following cases.

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## PIRTLE vs. PENN.

*Court of Appeals of Kentucky, 1835.*

3 Dana 247, 28 Am. Dec. 70.

Henry Pirtle filed a bill in chancery against Shadrack Penn, alleging that they were partners in the publication of "Pirtle's Digest;" that Pirtle, as author, was to furnish the manuscript, and Penn, as mechanic, was to execute the printing and binding, and each to be entitled to half of the proceeds to be derived from the sale of the books; that Penn was not bound to commence the printing unless he should be satisfied that the public patronage would be satisfactory and sufficient; that the state subscribed for five hundred copies, and individuals for two hundred and fifty copies, and that afterwards Penn had printed two thousand copies and bound about half of them, but that after dividing equally the gross sum paid by the state for five hundred copies, he had refused to permit Pirtle to have any control over the books, or any participation in the sale of them—alleging, for the first time, that he was entitled only to one-half of the net profits, after deducting the cost of printing and binding, which had not yet been wholly reimbursed; and lastly, that Penn was insolvent, and, therefore, praying for an account of sales which had been made, and for an injunction restraining further sales, and for the appointment of a receiver.

Penn in his answer to the bill and amended bill, admitted the partnership as alleged, with only one material qualification,

and that is, that his personal supervision and the interest on his capital expended in the publication were, by the agreement, to be a set-off against Pirtle's skill and labor in preparing the manuscript, and that the net profits only were to be divided, after reimbursing the amount expended in the printing and binding, and in the purchase of materials; denied that he was insolvent, and after exhibiting a general account, insisted that Pirtle had received about as much as he had himself received.

The circuit court having, on final hearing, dismissed the bill, this appeal is prosecuted to reverse the decree.

*Crittenden* and *Pirtle*, for appellant.

*Morehead & Brown*, for appellee.

ROBERTSON, Ch. J. (After stating the facts as above.) As there was no prayer for a dissolution of the partnership, interim management, by a receiver or otherwise, under the control or direction of the court, was not authorized by the established rules and usages of courts of equity. Gow on Part., 120, 139; Cary, 32.

And it has been said, that without a prayer for dissolution, a court of equity will not entertain a bill for an account, because such bills might be annual, or of indefinite recurrence.

But both principle and authority tend to the conclusion, that a bill for an account between copartners may be maintained without a prayer for a dissolution of the partnership, if there be any good reason for compelling an account and settlement. Cary, 34; Gow, 120, 136.

A court of equity may, moreover, compel a specific execution of a partnership contract, and may sometimes enjoin a partner from persisting in improper conduct, jeopardizing the rights or derogating from the power or authority of his copartner, and when the latter, if he can be protected and secured by injunction, does not desire a dissolution, but prefers a continuation of the partnership, according to the spirit and end of the association.

In this case, though there is no prayer for dissolution, yet, as Penn has been selling the books and does not deny that he refuses to permit Pirtle to control or participate in the sale of the residue, we think the circuit court had power to decree, and ought to have decreed some relief, if the allegations of the bill as to the terms of the partnership be true.

As there was no written memorial, nor any evidence *aliunde*, of the contract of partnership, its terms must be settled as a deduction of law from what the parties have agreed in their pleadings.

The parties agree, that one was to furnish the manuscript, and the other to print and bind it; but they disagree as to their proportion of interest in the gross proceeds.

Upon these facts alone, the law decides that what each contributed was his share of the joint capital, that their respective contributions were, by themselves, deemed equivalents, and that therefore each of them is entitled to an equal interest in the books, and in their gross vendible value. Gow, 9-10; 3 Kent's Com., 28-9; *Honore vs. Colmesnil*, 1 J. J. Mar. 506. The general conclusion of law, in the absence of any fact to the contrary, is that "the losses are to be equally borne and the profits equally divided." Kent's Com., *supra*.

But as profits are only what remains of the avails of the concern after defraying incidental expenses and reimbursing the capital, the counsel for Penn insists, that the rule of law applied to the facts of this case will entitle Pirtle to only one-half of "the net profits," after deducting a just compensation for materials, printing and binding, and that, consequently, Penn's understanding of the express agreement, and the legal interpretation of the character of the partnership are the same. This argument would be sound if the fact which it presupposes were admitted; but the assumed fact, to wit: That Penn's capital exceeded that of Pirtle, to the extent of the value of the materials, printing and binding, has no existence in proof or in presumption of law. If one partner contributes a thousand dollars and another contributes five hundred, nothing else appearing, equity would fix a corresponding ratio of interest, and of loss and gain between them.

But the productions of genius or of knowledge are scarcely appreciable, the value of writing a book must necessarily be uncertain, before publication. But that Pirtle's manuscript and copyright were of some value, and of considerable value too, and were so considered by both parties, cannot be doubted. The precise amount of the actual value was not only unknown, but unascertainable when the contract was made. Perhaps it exceeded the amount of all the cost of printing and binding; and it is far from being improbable that it did. But it is suffi-

dient only to observe, that the law cannot decide that the contributions of each partner were not of equal value, or were not estimated by themselves as equivalents. And therefore, in estimating profits, nothing is to be deducted in favor of the one or the other party for capital or excess of contribution to the joint stock.

This deduction of law is fortified, rather than weakened, by extraneous facts. From the pleadings, it must be taken as admitted, that by the contract of partnership, Penn was under no obligation ever to commence the publication, unless the patronage to be obtained should, in his judgment, be sufficient to insure his indemnity. The state afterwards subscribed for five hundred copies, which, added to two hundred and fifty copies subscribed for by individuals would, at eight dollars a copy, bring the gross sum of six thousand dollars. But it seems that the amount actually subscribed was six thousand three hundred and eighty dollars; the half of which, to wit: three thousand one hundred and ninety dollars, was, according to any hypothesis, assured to Penn before he began the printing, or was under any obligation to begin it; and which sum was, according to the proof, at least equal to the actual cost of printing and binding two thousand copies, including the cost of materials.

Then, according to these facts, Penn, if he were entitled to only one-half of the books or of their value, was sure of being reimbursed, and of then having left for his remaining interest in the books, after supplying the subscribers, six hundred and twenty-five copies, which, at eight dollars a set, would be worth five thousand dollars, which, or whatever that number of copies would sell for, would be clear profit.

Thus, supposing the contract to be as Pirtle avers it was, and as the law presumes it to have been, it appears that Penn incurred no hazard, and had a sure prospect of profit to a large amount, and that the whole risk and loss were Pirtle's.

It is intrinsically improbable, therefore, that Pirtle ever agreed that Penn should be entitled to more than one-half of the gross proceeds of the publication. But it is enough that there is no proof that Penn contributed more than Pirtle did to the joint stock, or that he was to have more than an equal joint interest; and, therefore, according to the proper deductions from the pleadings, the law will give him no more.

From this view of the case, it would seem that, under the circumstances of this case, Pirtle is entitled to a decree for an account, and for securing to him his equal control over the books, and correspondent participation in the sale or disposition of them, by a partial injunction, or otherwise, so as to effect that end most securely and appropriately. And consequently the absolute dismission of the bill was improvident.
* * *

Wherefore, it is decreed and ordered that the decree of the circuit court be reversed, and the cause remanded.

NOTE.—See Mechem's Elem. of Partn., §§ 152, 153.
See also *Howell v. Harvey, post.*

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## SHANNON vs. WRIGHT.

*Court of Appeals of Maryland, 1883.*

60 Md. 520.

Appeal from the Circuit Court of Baltimore City.

The appellee together with the appellants, were copartners in the business of manufacturing and dealing in metals in the City of Baltimore, under the firm name of Shannon, Wright & Co. A bill was filed by the appellee against the appellants, asking for an injunction and the appointment of a receiver, The case is further stated in the opinion of the Court.

The cause was argued before MILLER, STONE, ALVEY. IRVING and RITCHIE, JJ.

*William M. Busey* and *Samuel Snowden* for the appellants.

*Sebastian Brown* for the appellee.

RITCHIE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court of Baltimore City appointing a receiver and granting an injunction; with leave to the defendants after filing answers to the bill and upon giving five days' notice to the complainant, to move for the rescinding of the order and the dissolution of the injunction.

The answers have been filed; but under the construction repeatedly given to the 21st Sec. of Art. 5 of the Code of Pub. Gen. Laws, this Court is confined on the appeal provided by the statute to the case made by the bill, and does not examine the answer. The averments of the bill, whatever may be the real state of the facts, must be taken as true. *Haight & O'Connell vs. Burr*, 19 Md. 130.

Our duty therefore is simply to determine whether the case stated by the complainant was one which justified the passage of the order appealed from.

Without pausing to dwell upon those averments of the complainant which impute fraudulent misrepresentations to the defendants as to the value of the firm's assets and its business, by which he was induced to enter into a partnership with them, which has disproportionately engulfed his means and exposed him to great loss, we find in the specific allegations of clause ten of the bill ample ground for the equitable interposition he has invoked. That clause is as follows:

"And now your orator charges, that debts are due by, and suits are pending against, the firm, and that the defendants having the money of the firm in their possession, refuse to apply it toward the payment of said debts, that they refuse to give any money to your orator; that they refuse to permit your orator's counsel to examine the books of the firm; that they refuse to allow a competant book-keeper, selected by your orator, to examine the books of the firm; that in order to anticipate debts owing to the firm, and thus get the firm's money in their pockets, they have drawn drafts in the name of the firm upon their customers, and procured the same to be discounted by their lawyer and others at exorbitant rates of interest; that without the knowledge or consent of your orator they have given notes of the firm in settlement of debts not owing by the firm, one of said debts being for clothing purchased by D. R. Shannon and John T. Shannon, individually; that without the knowledge or consent of your orator the said D. R. and John T. Shannon have offset their own debts by sales of merchandise of the firm of Shannon, Wright & Co.; that they have no tangible property outside of their interest in said firm; that they represent themselves to be three stubborn brothers, and express their intention of litigating the matters in controversy by means of the firm's money until they have ruined your orator; that the said D. R. Shannon and John T. Shannon refuse to return the money which has been advanced to pay their debts;

that defendants declare themselves to be unwilling to continue said partnership, even if your orator was willing, and yet they utterly refuse to dissolve the partnership; that they threaten to make contracts in the name of the firm, knowing they cannot be carried out, which contracts, if made, will render your orator liable in damages; that judgments will shortly be entered against the firm, and your orator damaged, unless the money in the hands of the defendants be applied to the payment of the notes sued on, as above stated; and your orator charges that unless immediate relief be given by way of an injunction and receiver, which he is advised is the proper remedy, he will be reduced from a reasonable competence to poverty."

There is evidently here set out such a case of alleged fraud and imminent danger to the complainant's interest in the partnership property as justifies a receiver and an injunction; proceedings which do not determine the rights of the parties, but simply protect the property from injury or destruction until those rights can be further inquired into or adjudicated. The order appealed from must be affirmed.

Order affirmed and cause remanded.

NOTE.—See Mechem's Elements of Partn., §§ 152, 155.

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## NEW vs. WRIGHT.

*Supreme Court of Mississippi, 1870.*

44 Miss. 202.

New filed a bill in equity against Wright, alleging that New owned a tract of cypress timber, a mill site and part of the machinery and material for the construction of a saw-mill: that he entered into partnership with Wright who was to supply the necessary materials and machinery to complete the mill, and was to superintend the construction and management; that the timber was to be sawed into lumber, and the proceeds divided equally after reimbursing each party for a stipulated portion of his outlay on the mill; that New was to supply the timber and Wright was to pay all the expenses of sawing and selling. The bill further charged that Wright refused to account, alleging that the proceeds did not equal the outlay by about $7,000, etc.; that Wright had ceased to use complainant's timber and was procuring it elsewhere; that

Wright was so largely indebted to complainant that the latter could not be paid unless out of the proceeds of the timber and lumber which Wright had about the mill; and the bill prayed an injunction to prevent Wright from removing or selling the lumber or timber, that a receiver be appointed, the partnership dissolved and an accounting had. A preliminary injunction was issued, but the court subsequently dissolved it and denied the application for a receiver. New thereupon appealed.

*Geo. L. Potter*, for appellant.

No appearance for appellee.

PEYTON, C. J. (After stating the facts.) The propriety of the action of the court in dissolving the injunction is impeached by the appellant, and presents the first question for our consideration. The bill of complaint charges that neither party contemplated any use of the said mill than to saw the cypress timber on the complainant's said tract of land, on which the mill was erected, and for the sawing of no other timber, and that the said defendant, in disregard of the terms of the partnership, and without the consent of the complainant, has ceased to procure cypress timber from the said tract of land of the complainant, for the use of the saw-mill thereon, and has been for some time heretofore, and now is, procuring other cypress from other persons to saw, and is sawing the same into lumber on said mill, and thereby defeating one of the objects the complainant had in view in entering into the partnership, and that object was to turn his own cypress timber into productive capital. And this allegation is, to some extent, corroborated by the evidence of the appellee, who testified that his wife bought saw logs and timber. This was using the mill in a manner unauthorized by the terms of the contract of partnership, and would justify an injunction, and together with the loss of seven thousand dollars in running the mill for more than three years, would perhaps authorize a dissolution of the partnership. The injunction, therefore, could not have been properly dissolved for the want of equity on the face of the bill. * * *

The remaining question for our decision is, did the court err in overruling the motion for the appointment of a receiver? "It must be admitted," said the master of the rolls, in *Madg-*

*with vs. Wimble*, 6 Beavan, 495, "that when an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership, at the risk and probably at the great loss and prejudice of the dissenting party. Between these difficulties, it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties."

In order to justify the dissolution of a partnership, on the ground of misconduct, abuse, or ill-faith of one of the parties, it is not sufficient to show that there is a temptation to such misconduct, abuse, or ill-faith, but there must be an unequivocal demonstration, by overt acts or gross departures from duty, that the danger is imminent, or the injury already accomplished: Story on Partnership, 464, § 288. Where a concern of any character or kind, covering a partnership, is broken up by controversial suits, and it is apparent that there can be no agreement between the parties in interest for its continuance, a receiver will be appointed: *Williams vs. Wilson*, 4 Sandf. (N. Y.) Chan. 379; Edwards on Receivers, 330. And a dissolution of a partnership may be granted and a receiver appointed on account of the gross misconduct of one or more of the parties: 1 Story's Eq. 635, § 672 *a*. To authorize the appointment of a receiver there must be some breach of the duty of a partner, or of the contract of partnership: *Harding vs. Glover*, 18 Ves. 281.

It was the duty of the appellee to take the timber used in the mill, from the tract of land on which it was erected, belonging to the appellant; and the getting timber elsewhere, as alleged in the bill of complaint, was a breach of that duty and of the contract of partnership. And if the mill sawed six thousand feet of lumber per day, and the running of the mill from the fall of 1865 to the commencement of this suit in the spring of 1869, brings the parties in debt seven thousand dollars, as stated by the appellee in his testimony, it would seem to be a business which neither party should desire to continue.

Upon the whole, we are of opinion that the case made by the bill authorizes the appointment of a receiver, and that, therefore, the court erred in overruling the application therefor.

For the reasons herein stated, the decrees of the court in dissolving the injunction and overruling the motion for the appointment of a receiver, will be reversed, and the cause remanded for further proceedings in accordance with this opinion, with leave to the appellee to answer the bill within sixty days from this date.

NOTE.—See Mechem's Elem. of Partn., § 152, 155.

For other cases of dissolution in courts of equity, see *Gerard* vs. *Gateau*, post.

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## BUCK vs. SMITH.

*Supreme Court of Michigan, 1874.*

29 Mich. 166, 18 Am. Rep. 84.

Bill in equity by Buck against Smith for specific performance of the agreement referred to below and more specifically set out in the opinion, and for an accounting and injunction. The bill recited that G. W. Swan, J. R. McArthur, W. McArthur and J. F. McDonald had been partners in the lumbering business, under the name of McArthur & Co., and had large and valuable property; that Smith agreed with complainant Buck that Smith would buy the interest of Swan and J. R. McArthur, in the firm's real and personal property; convey one-half of this interest to Buck to be paid for as rapidly as he could do so out of the profits or otherwise; and that Buck, Smith, W. McArthur and McDonald should then go into partnership to manage and work the lumber property formerly so belonging to McArthur & Co.; that Buck should have the management of the business, give it his personal attention and go to reside near the property; that Smith bought the interest referred to, but went into partnership with the others, excluding complainant, and thereby deprived him of valuable gains and property.

The court below dismissed his bill and Buck appealed.

*M. Buck*, in person, and *D. W. Perkins*, for complainant.

*C. I. Walker*, for defendant.

GRAVES, C. J. (After stating the facts.) We consider it very clear that the case which the complainant makes by his bill is not suitable for the jurisdiction invoked. The power vested in courts of equity to compel the specific performance of contracts, instead of leaving parties in all cases to obtain common-law redress through actions for damages, is a very useful one when legitimately exercised. It must, however, be borne in mind that the jurisdiction has many necessary limits and qualifications, and that it does not necessarily attach or operate with imperative force wherever a contract relation exists which the complainant has respected and the defendant has not. In each case the court must consider whether, in view of all the facts and those doctrines which are interwoven with the very texture of equity jurisprudence, and in view of the specific peculiarities presented, and the settled principles and maxims of the court, it is right and proper to entertain the case and administer relief. *McMurtie vs. Bennette*, Har. (Mich.) Ch. 124; *Smith vs. Lawrence*, 15 Mich. 499; *Chambers vs. Livermore* 15 Mich. 381; *Millard vs. Tayloe*, 8 Wall. (U. S.) 557. Among the primary considerations is the question whether the substantial sense and design of both parties can be worked out by the decree of the court, since the real equity of the proceeding, the spirit of the particular jurisdiction, means performance on both sides and not a compulsory surrender by one party to another without a present substantial and practical equivalent,—an equivalent susceptible of enforcement and execution by the court.

Now, what is the real essence of the case made by this bill? What is the arrangement the court is asked to carry out? It is an agreement, according to the representation of complainant, between himself and the defendant, by which the latter agreed to convey an undivided interest in real and personal property held by defendant in common with third persons, and that the complainant should, for an indefinite time, become a partner with the defendant and such third persons in operating the property; that the defendant should advance from time to time the complainant's quota of the funds necessary for the business and the improvement of the property; that the com-

plainant should have the right to manage and direct the business and the improvements; and that he would employ his time, skill, judgment and experience in the direction and supervision of the property and business, and that the purchase price of his proprietary share, and the amount advanced for his benefit in carrying on the business, should be paid by his skill and services in the concern, and the gains obtained in the enterprise.

Waiving all objection founded on the circumstance that the bill does not assert that McDonald and McArthur became in any manner engaged with complainant to admit him to a partnership, or to clothe him with any right or power to manage their interests, we *first* encounter the rule, which is pretty well recognized, that the court will not enter upon so vain an undertaking as to compel a party to go into a partnership where the agreement is silent as to its duration, and where, therefore, it may be dissolved at the will of either as soon as formed.

But, *secondly*, we confront the inevitable and very formidable objection that the agreement by its very nature is practically not enforceable on both sides. It is extremely plain that the court cannot assume to enforce the performance of daily prospective duties, or supervise or direct in advance the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member, and where, too, the stipulated arrangement as plainly set forth contemplates that his personal skill and judgment shall be applied and govern according to the shifting needs of property and business. No court is competent to execute such an arrangement. The complainant's portion of the executory scheme, then, which relates to his introduction to the position of partner and manager, to his rights and duties in that position, and to the agreed method for working out the compensation to be made by him for the benefit he seeks, cannot be specifically enforced. Looking at the case made by the bill, the court is powerless to execute the equivalent the complainant is bound to render. If a conveyance to the complainant should be ordered, he would get at once the essence of what he claims, whilst the defendant would fail in getting, through a decree, any substantial consideration whatever.

As the court possesses no means by which to work out performance on the part of complainant, he would become at once invested with the benefit for which he prosecutes, whilst the

defendant would be left standing upon a naked right to exact the consideration through the future performance of duties incapable of being specifically decreed. The doctrine of the court will not sanction such one-sided relief; *Blackett vs. Bates*, L. R. 1 Ch. App. 117; *Stocker vs. Brockelbank*, 3 McN. & G. 250, 5 Eng. L. & Eq. 67; *Johnson vs. Shrewsbury & B. R. W. Co.*, 3 DeGex. M. & G. 914, 19 Eng. L. & Eq. 584; *Pickering vs. Bishop*, 2 Y. & Col. Ch. 249; *Kemble vs. Kean*, 6 Sim. 333; *Kimberley vs. Jennings*, 6 Sim. 340; *Baldwin vs. Society*, 9 Sim. 394; *Gervais vs. Edwards*, 2 Dr. & W. 80; *Bozon vs. Farlow*, 1 Mer. 459; *Flight vs. Bolland*, 4 Russ. 298.

It is, then, very apparent, that, apart from other difficulties, the case presented by the bill is wanting in mutuality, and is not so constituted as to warrant the court in giving the relief demanded. As a consequence, the decree below dismissing the bill must be affirmed, with costs, but to preclude all question as to the effect of it, it may be so varied as expressly to be without prejudice to any proceedings at law the complainant may think proper to take.

NOTE:—In *Morris vs. Peckham*, 51 Conn. 128, it is said, "It is a rule in equity that the court will not decree a specific performance where it has no power to enforce the decree. Hence partnership articles will not be enforced, especially where no time is fixed for its continuance, as either party may dissolve it at pleasure. And even where a time is fixed it is difficult to see how the decree can be enforced. Take this case as an illustration; is the court to keep its hand on the parties for seventeen years and compel them to carry on this business?" In Pollock's Dig. of Partn, 6, it is said: "'The remedy of specific performance is generally not applicable to an agreement to enter into partnership, for 'it is impossible to make persons, who will not concur, carry on a business jointly for their own common advantage.'"

See also *England vs. Curling*, 8 Beav. 129; *Scott vs. Rayment*, 7 Eq. 112.

See also Mechem's Elements of Partnership, §§ 81, 149–151, and notes.

## SOMERBY vs. BUNTIN.

*Supreme Court of Massachusetts, 1875.*

118 Mass. 279; 19 Am. Rep. 459.

Bill in equity filed January 9, 1872, by John P. Somerby and Jeremiah Prescott, alleging substantially the following facts:

The defendant, in the years 1865 and 1866, invented a new and useful improvement in seats for railroad passenger cars, and being desirous to obtain letters patent therefor, or otherwise to so use or dispose of his invention as to realize money therefrom, applied to the plaintiffs for assistance in both of these respects, and offered the plaintiffs each one-third part of the property in the invention, and of all moneys and emoluments which should result therefrom, as compensation for affording him the solicited assistance. The plaintiffs accepted the said offer of the defendant; and an oral agreement was made between the parties that the invention, by which all letters patent which should be granted therefor, should be the joint property of the plaintiffs and the defendant, each to be the owner of one-third part thereof, and that each and all of the parties should use his best efforts to make said invention available and remunerative for the common benefit of all the parties. In pursuance of this agreement, application was made in the name of Buntin for letters patent of the United States, and the expenses of making and prosecuting the application were paid by Somerby, and sales of the right to use the invention were made primarily through the agency of Prescott, from which sales divers sums of money were received, which were divided between Buntin and the plaintiffs in the proportion of one-third part to each, in pursuance to the agreement. The invention was rapidly advancing in public favor, chiefly through the labor, expenditures and exertions of the plaintiffs, and the sales of rights to use the same were increasing in a similar ratio, so that the proceeds of the sales had become large and were steadily augmenting, and would have yielded to the

plaintiffs a large income for their time, labor and expenditures in the premises, but that the defendant early in the year 1867, while the aforesaid application to the United States for letters patent was pending, and without the knowledge or consent of the plaintiffs or either of them, made application to the United States for letters patent in his name and in another form, for the said invention, on which application letters patent were granted to him, on or about April 2, 1867, for a "design for end frame of a car seat," which was the invention of the defendant that had become the property of the defendant and the plaintiffs. Upon the receipt of the said letters patent by the defendant, he refused to assign any part thereof to the plaintiffs, and denied that they had any right therein or in the invention, or in the proceeds thereof, and proceeded to make large sales of rights to use the invention under the letters patent, and has received therefrom divers large sums of money for which he refuses to render any account to the plaintiffs, or to make any division thereof with them, and pretends that all said sums of money belong to him, and that the plaintiffs, or either of them, have no property or right therein.

The prayer of the bill was that the defendant might be restrained from making any sale or assignment of the said letters patent, or of the invention, to any person or persons other than the plaintiffs without their consent; that he be compelled to assign and transfer to each of the plaintiffs one-third part of said letters patent and invention; for an account of all sums of money and of all other considerations received by him for sales under said letters patent or for licenses to use the invention; and the payment to each of the plaintiffs of such sums of money and other considerations as should be found to be due to them respectively; and for general relief.

The defendant demurred to the bill upon the grounds which appear in the opinion. The case was heard by Gray, C. J., upon the bill and demurrer, and reserved, at the request of the parties, for the consideration and determination of the full court.

*T. L. Livermore* for defendant.

*J. P. Healy* for plaintiff.

GRAY, C. J. The causes assigned in the demurrer are, 1st, that the contract sought to be inforced is not in writing; 2d that it is against the course and practice and not within the jurisdiction, of this court to entertain suits for the specific performance of oral contracts; 3d, that the plaintiffs have not stated such a case as entitles them to any discovery or relief in equity.

1. In support of the first cause assigned, the defendant relies on the section of the statute of frauds relating to the sale of goods, wares or merchandise; Gen. Stats., ch. 105, sec. 5; and also on the clause of the same statute relating to agreements not to be performed within one year from the making thereof. Sec. 1, cl. 5.

It was held by the court of Chancery in England, before the American Revolution, that shares in a corporation were goods, wares and merchandise within the statute of frauds. *Mussel vs. Cooke*, Pre. Ch. 533; *Crull vs. Dodson*, Sel. Cas. in Ch. 41. And it has been held by this court that such shares, and even promissory notes, fall within the statute. *Tisdale vs. Harris*, 20 Pick. 9; *Baldwin vs. Williams*, 3 Metc. 365. But the modern decisions in England are the other way, and the decisions in other states are at variance. Browne on Stat. of Frauds, secs. 296, 298; 1 Chit. on Cont. (11th Am. ed.) 541, note. The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form. To include in them an incorporeal right of franchise, granted by the government, securing to the inventor and his assigns the exclusive right to make, use and vend the article patented; or share in that right, which has no separate or distinct existence at law until created by the instrument of assignment, would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough. See *Chanter vs. Dickinson*, 6 Scott N. R. 182; S. C. 5 Man. & Gr. 253.

But it is not necessary in this case to go so far as to say that a sale of letters patent for an invention is not within the statute of frauds. Before letters patent are obtained, the invention exists only in right, and neither that right nor any evidence of it has any outward form which is capable of being transferred or delivered *in specie*, or which, upon any construction, how-

ever liberal, can be considered as goods, wares or merchandise. So far as regarded the letters patent when obtained, the contract between the parties in this case was not a contract of sale, but a contract of partnership, which would be equally valid whether written or oral. Story on Part., sec. 86; 1 Lindley on Part. (3d ed.) 89. According to the contract alleged, the defendant was to contribute to the proposed partnership his inchoate right in the invention; the plaintiffs were to contribute the money necessary to make that invention available in the form of a patent; and both were to contribute their services to make it remunerative. The patent, when obtained, was therefore not the result of the efforts, the service or the money of one partner, but the joint contribution of all, and was in equity partnership property, in whosesoever name letters patent were taken out. 3 Kent's Com. (12th ed.) 24–26; *Green vs. Beesley*, 2 Scott 164; s. c. 2 Bing. N. C. 108; *Sims vs. Willing*, 8 S. & R. 103; *Musier vs. Trumpbour*, 5 Wend. 274; *Duryea vs. Whitcomb*, 31 Vt. 395; *Dyer vs. Clark*, 5 Metc. 562; *Fall River Whaling Co. vs. Borden*, 10 Cush. 458; *Bulfinch vs. Winchenbach*, 3 Allen 161.

We are therefore of opinion that the contract set up in the bill was not an agreement for the sale of goods, wares or merchandise, within the statute of frauds.

The agreement to obtain letters patent might be performed within a year, and it does not appear by this bill that all the efforts required of either party, to make the invention available and remunerative for the common benefit, might not also be exerted within that time. As it does not appear that the contract could not be performed within a year, it does not fall within the statute of frauds. *Blake vs. Cole*, 22 Pick. 97; *Doyle vs. Dixon*, 97 Mass. 208; Brown on Stat. of Frauds, secs. 272–282. It may be doubted whether the case of *Packet Co. vs. Sickles*, 5 Wall. 580, cited by the defendant, in which an oral contract to pay, for a right to use an invention on a certain steamboat, so much a year during the term of a patent having twelve years yet to run, "if the said boat should last so long," was held to be within the statute, can be reconciled with the general current of authority in this Commonwealth and elsewhere; but it is quite unlike this case, in which it does not appear that the parties contemplated that the time for the performance of their contract should exceed a year.

2. It is now well settled that the jurisdiction of courts of equity to decree specific performance is not confined to contracts for the sale of land, but may be exercised, upon sufficient cause shown, over agreements for the transfer of interests in personal property or patent rights. 1 Story's Eq. Jur. ch. 18; *Clark vs. Flint*, 22 Pick. 231, 239; *Leach vs. Fobes*, 11 Gray 506, 510; *Todd vs. Taft*, 7 Allen 371; *Binney vs. Annan*, 107 Mass. 94; *Corbin vs. Tracy*, 34 Conn. 325. Even oral contracts will be specifically enforced, when the case is not within the statute of frauds, and no complete and adequate remedy can be had by an action at law. *Colt vs. Nettervill*, 2 P. Wms. 303; *Clifford vs. Turrell*, 1 Yo. & Col. Ch. 138; *Duncruft vs. Albrecht*, 12 Sim. 190; *Union Ins. Co. vs. Commercial Ins. Co.*, 2 Curtis 524; s. c. 19 How. 318; *Glass vs. Hulbert*, 102 Mass. 24, 33.

Under the Revised Statutes, indeed, the equity jurisdiction of this court to decree specific performance was confined to written contracts. Rev. Stats., ch. 74, sec. 8; ch. 81, sec. 8. But by the Stat. of 1857, ch. 214, the legislature conferred upon this court "full equity jurisdiction, according to the usage and practice of courts of chancery, in all cases where there is not a full, adequate and complete remedy at law." The re-enactment of this statute in the Gen. Stats., ch. 113, sec. 2, is not to be limited in effect by reason of its being accompanied by a re-enactment of the more restricted provisions of the Revised Statutes and of the successive statutes by which our equity jurisdiction had been from time to time extended.

The oral agreement of the parties, alleged in the bill, that the invention and all letters patent which should be granted therefor should be their joint property, in proportions specified, stands upon the same ground as if it had been in writing. Such an agreement, though made before the issue of a patent, is valid, and capable of being enforced in equity by compelling an assignment, an account and such other relief as the circumstances of the case may require. *Herbert vs. Adams*, 4 Mason 15; *Nesmith vs. Calvert*, 1 Woodb. & Min. 34; *Clum vs. Brewer*, 2 Curtis 506; *Binney vs. Annan*, 107 Mass. 94. Although a court of equity will not ordinarily decree specific performance of an agreement to form a partnership which may be immediately dissolved by either party, it will secure to a partner the interests in property to which by the partnership agreement he

is entitled. *Buxton vs. Lister*, 3 Atk. 383; Story on Part., sec. 189; 1 Story's Eq. Jur., sec. 666.

The bill sufficiently alleges that the plaintiffs performed the agreement on their part, and that the profits received before the issue of the patent were duly divided between the parties. It is not alleged, and is not to be presumed, that the plaintiffs have received any profits, for which they are bound to account, since the defendant procured the patent to be issued in his own name alone.

For these reasons, none of the causes of demurrer assigned afford any ground for refusing to entertain jurisdiction of the bill. The objection of laches was not taken in the demurrer filed, nor assigned *ore tenus* at the hearing before a single justice. It is therefore not open to the defendant.

Demurrer overruled.

NOTE.—See Mechem's Elements of Partn., § 151.

# IX.

## POWERS OF PARTNERS.

### SWEET vs. WOOD.

*Supreme Court of Rhode Island, 1893.*

18 R. I. 886, 28 Atl. Rep 835.

Assumpsit for the use of a horse let to hire. Plaintiff had judgment below. The opinion states the facts.

*W. B. Tanner* and *E. L. Gannon*, for plaintiff.

*S. S. Stone* and *E. F. Lovejoy*, for defendants.

MATTESON, C. J. The defendants petition for a new trial on the ground of erroneous ruling, and also because the verdict is against the evidence. The testimony shows that the defendants, as copartners, were engaged in keeping a general store in Burrillville, and that they had occasion to use horses in carrying on their business. The plaintiff testifies that Frank W. Wood, one of the defendants, came to him and stated that they (the defendants) were in need of a horse and would like to get his to use for a few days; that he consented to such use; and that said Wood thereupon took the horse away. This, however, was denied by Wood, who testified that he asked the plaintiff for the use of the horse for one Walden in his laundry business, and that, with the plaintiff's permission, he took the horse to Walden's stable; that Walden continued to use the horse for several months, to the plaintiff's knowledge; that the plaintiff, at different times, took the horse from Walden's stable and returned him there when he had done using him. The defendants requested the court to instruct the jury that, if they found that the hiring of the horse was not necessary for the carrying on of the partnership business in the ordinary

way, the firm was not *prima facie* liable for the hiring by one partner alone. The request was refused, and the defendants excepted.

We think the request was properly refused. As the use of horses was necessary for carrying on the partnership business in the ordinary way, the hiring of a horse for that purpose was clearly within the scope of the partnership business. The rule is too well established to admit of question that the acts, admissions, and declarations of a partner during the existence of the partnership, while engaged in the transaction of its business, or relating to matters within its scope, are evidence against the firm. 17 Amer. & Eng. Enc. Law, 1077, and cases cited in note 2. It was wholly immaterial whether, as a matter of fact, the hiring of a horse was or was not necessary for carrying on the business of the firm in the ordinary way; for being within the scope of the partnership business, and therefore within the authority of one partner to bind the firm, the firm would be bound by the declaration of the partner that the firm needed the horse for the transaction of its business, whatever the fact might be.

The defendants also requested the court to instruct the jury that one partner could not, without authority from the other members of the firm, bind the firm on an implied contract, not in any way connected with its business, or for its benefit. The court gave the instruction, with the qualification that, if the partner declared when he hired the horse that it was for the benefit of the partnership, it would be responsible. To this qualification the defendants excepted. We think the instruction requested, in view of the testimony, was erroneous, and that the qualification of it was correct. The request was erroneous, in that it assumed, contrary to the evidence, that the hiring by one partner was unauthorized by the other. It was not unauthorized by the other, because, as we have seen, it was within the scope of the partnership business, and one partner is the agent of his copartner in all matters within the scope of the partnership business. As such agent, his declarations are sufficient to bind his copartner, whether in accordance with the fact or not.

The verdict is supported by the testimony of the plaintiff. Though this testimony is denied by that of the defendant, Frank W. Wood, and though there are circumstances which

may or may not, according to the view taken of them, tend to corroborate the testimony of the latter, it is the province of the jury to judge of the credibility of the testimony, and to determine its weight. Unless it is clear that they have made a mistake, or have been swayed by passion, partiality, corruption, prejudice, or sympathy, so that their verdict is strongly against the evidence, the intervention of the court is unwarranted. Defendants' petition for a new trial is denied and dismissed.

NOTE: See Mechem's Elem. of Partn., §§ 162, 181, 192.

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## BARNARD vs. PLANK ROAD CO.

*Supreme Court of Michigan, 1859.*

6 Mich. 274.

This was an action brought by the plank road company to recover upon a subscription made to its stock by Coe in the name of Coe & Barnard. Barnard alone defended. One Johnson testified that a plank road was very necessary to enable lumbering operations to be carried on in the vicinity in which defendant's lands were situated. Judgment for plaintiff, and Barnard brings error.

*Mitchell & McAlpine*, for Barnard, were stopped by the court.

*Conger & Harris*, for the company.

MARTIN, C. J. Barnard & Coe are admitted to have been "partners in the lumbering business, owning lands in St. Clair county as such partners, and manufacturing lumber therefrom." While such partners, Coe subscribed the name of the firm to the articles of association of the plank road company, but without Barnard's knowledge or consent. This subscription, it is claimed, made Barnard a stockholder in the company.

No rule is better settled than that one partner cannot bind his copartner by any contract not within the immediate scope of the partnership, unless with such copartner's knowledge and consent. Each partner is an agent for all the members of the

firm, in the transaction of all business of such firm; but as to matters foreign to such business, he is regarded as a stranger. The general business of the firm being that of manufacturing lumber, and the ownership of land as incident thereto, the subscription to stock in a corporation, or to articles of association for the creation of one, was not an incident of such partnership. Incidental benefits would not authorize one partner to bind his fellow, and no authority so to bind him is shown.

And the knowledge and assent required to bind the copartner must be established by evidence affirmatively showing it, or from which it may be clearly inferred. This is sought to be established from the fact that assessments were made, and their payment demanded of the firm, which were unresponded to; and it is urged that it was Barnard's duty, upon such demands, to repudiate any interest in the company, and that his silence should be construed into a recognition of his relation as a stockholder. Now, a demand either through the mail, or personal, is sufficient to bind a stockholder, but not to create one. If the person of whom the demand is made be not one, it is not his duty to disclaim the character of stockholder; it is enough that he does not respond to such demand. The simple admission that demand was duly made of the firm, is not one of a personal demand of Barnard, nor is it of anything more than a fact—its effect being a question of law. There is no evidence, nor any admission, in the case, that knowledge of the demand ever came to Barnard; and certainly none that he ever, by any word or act, recognized any connection with the company.

The liability of Barnard is also sought to be established from the testimony of Johnson. This testimony is objected to, as inadmissible under the case as presented, and for general incompetency.

We do not regard the stipulation as the making of a case, but only as an admission of facts for the purpose of obviating the necessity of producing witnesses to prove them. Any other facts necessary for either party to show could still be proven.

The testimony was competent as tending to show the interest of the partnership in the road, but falls far short of being

sufficient to establish, or of tending to fix, any liability upon Barnard.

The judgment must be reversed, and a new trial granted.

The other justices concurred.

NOTE: See Mechem's Elem. of Partn., § 165.

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## BANNER TOBACCO CO. vs. JENISON.

*Supreme Court of Michigan, 1882.*

48 Mich. 459, 12 N. W. Rep. 655.

On June 26, 1875, the defendants, Luman and Lucius Jenison, were in business as partners in the milling business at Jenisonville under the name of L. & L. Jenison. One B. F. Emery, who was in business at Whitehall, owed them about $1,000. He was also heavily indebted to others and presumably insolvent. Under these circumstances, and of his own motion, he put on record a chattel mortgage on his stock to defendants and then telegraphed them to come to Whitehall. Luman Jenison, who had personal charge of the milling business, went. While at Whitehall an arrangement was made between him and Mr. Emery under which the apparent ownership of the stock of goods was placed in the firm of L. & L. Jenison, and their name placed upon the store as is usual to indicate proprietorship. Mr. Emery was then to go on and sell the stock in the usual course of business as their agent, keeping it up by new purchases as should be found needful. Luman Jenison in his testimony says that no purchases were to be made on credit, and all authority to use the credit of the firm was expressly withheld. Emery denies this, but admits he was cautioned not to get the store in debt. He bought, however, from time to time on credit, and among other purchases made of the plaintiff the purchase of cigars, the bill which is the subject of this suit. Luman Jenison at the time of the arrangement opened a bank account for Emery in the name of L. & L. Jenison with a banker at Whitehall, and Emery pro-

cured letter and bill heads in the same firm name which were used by him.

The business continued under this arrangement until the fall of 1879; Emery and Luman Jenison evidently understanding that, though Emery was ostensibly agent, he was really as between the parties themselves only mortgagor, with permission to sell the mortgaged goods to pay the debt. He did not, however, during all this time reduce the debt, but on the other hand received flour from defendants for which he paid only a part. Meantime he took the benefit of the bankrupt law, and received his discharge. On September 11, 1879, Luman Jenison went to Whitehall and with the concurrence of Emery sold out the stock to one Banks, realizing therefor less than the sum due his firm. Subsequently the account of the plaintiff was presented to him for settlement, and he refused to recognize any liability upon it. It was then put in suit. Plaintiff had judgment and defendants appealed.

*Taggart, Stone & Earle*, for plaintiff.

*J. C. Fitzgerald*, for defendants.

COOLEY, J. (After stating the facts.) If the plaintiff's case is weak in any point it is in the evidence to connect Lucius Jenison with the arrangement whereby Emery was made agent for carrying on the business at Whitehall. The circuit judge correctly instructed the jury that if the action of Luman Jenison was taken, and the business subsequently carried on in the name of L. & L. Jenison without the knowledge of Lucius at the time or his subsequent ratification, there could be no recovery in this action; but that if Lucius authorized it, or knew how the business was being conducted and did not dissent, then both were bound to the extent of the agency Luman undertook to create. He also instructed them that merely leaving Emery in possession with instructions to sell the goods, would not give him authority to purchase goods on credit. This instruction was as favorable as defendants could ask, and we find no requests refused which we think the defendants entitled to.

It is conceded that the authority of Luman Jenison as a partner in the mill did not empower him to engage the firm in another and independent business without the consent of his associate. It was a very important fact, however, that the

debt for which Luman Jenison assumed to take security in the peculiar manner above described was a partnership debt. He undoubtedly had authority to take goods in payment, and to create an agency for the purpose of selling off the goods so taken; and if in his opinion keeping up the stock for a time was the best means of enabling the goods to be sold to advantage, very slight circumstances of knowledge or assent on the part of his copartner ought to be sufficient to make the firm responsible for the acts of the agent in keeping up the stock in the usual way. Secret instructions to the agent under such circumstances cannot avail. It would be a reproach to the law if it could suffer a principal to escape responsibility for those acts of the agent which, according to the usual course of the business in which he was engaged, the public had a right to understand were authorized. There was abundant evidence in the case to charge Luman Jenison, and we think there was also enough from which the jury might infer that Lucius Jenison could not have been ignorant of the business carried on so long in the name of his firm.

It was urged on the part of the defense that as the defendants had a known place of business which they personally managed, and which was altogether different from that carried on at Whitehall, the plaintiff was guilty of negligence in making sale to Emery without first communicating with defendants and learning from them directly what was the extent of Emery's agency. We think, on the other hand, that the negligence, if any, was all on the other side. The arrangement under which L. & L. Jenison became apparent owners, while as to Emery they were mortgagees only, and under which Emery for several years was enabled to carry on business though a bankrupt, was more than questionable in its nature, and if it landed the parties in trouble it was what they ought to have anticipated. The plaintiff sold its goods in the usual course of trade, and with no reason to doubt that Emery had the authority he professed to have, and which one of the defendants at least, according to the evidence which the jury believed, had done what he could to confer.

(Omitting a question of practice.)

Affirmed.

NOTE:—See Mechem's Elem. of Partn., §§ 165, 166.

## BOARDMAN vs. ADAMS.

*Supreme Court of Iowa, 1857.*

5 Iowa 234.

The plaintiffs, Boardman & Gray, were manufacturers of pianos at Albany, N. Y. Adams & Hackley were partners in the printing business and published the "Tribune" newspaper at Dubuque, Iowa. On June 19, 1854, Adams wrote to plaintiffs, saying "your offer to us of an agency, we accept," and urging plaintiffs to send sample pianos. Hackley also wrote the same day, recommending Adams as a competent man, and saying: "I think you would promote your interest by shipping us, at once, a small but select assortment of your instruments." Plaintiffs replied on June 23 declining to send any as samples, but offered to sell them the pianos on certain terms and said they had forwarded two on those terms. On September 29 Hackley wrote, "We have just effected a sale of your two pianos at six months. We have a prospect of selling two or three more, if we had them. A. W. Hackley." On the receipt of this letter plaintiff shipped two more pianos on the terms mentioned in their previous letter. Hackley received these pianos and put them in the hands of a commission merchant for sale. When sold the proceeds were paid to Hackley. Adams had nothing to do with this last transaction, and, in fact, the partnership between Adams and Hackley had been dissolved about August 25. Not receiving pay for any of the pianos plaintiffs brought this action against Adams & Hackley to recover the price of the four. Verdict for plaintiffs, and Adams appeals.

*Smith, McKinlay & Poor*, for appellant.

No appearance for plaintiffs.

STOCKTON, J. The court charged the jury that the plaintiffs must recover for pianos sold and delivered, or they could not recover at all; that if the pianos were sold to Hackley alone, and not to the firm, the plaintiffs could not recover in this action; that there must be satisfactory proof, either that the

buying and selling of the pianos was within the scope of the partnership business of defendants, or that they jointly ordered the pianos from plaintiffs, before they can recover; that plaintiffs having sued for pianos sold and delivered, cannot recover on proof that the pianos were sent to defendants to be sold on commission, or on any other proof falling short of proof of sale and delivery; and that the jury must examine the testimony with reference to each of the defendants separately. It is first assigned for error, that the district court refused to charge the jury that it was necessary for plaintiffs to show that Adams had knowledge of the whole of the transactions, and consented thereto (or what was equivalent thereto), before he could be made liable. It is assumed that the refusal of the court to charge the jury as requested was in effect saying to them that one member of a partnership firm, without the consent of the other partner, can bind the firm in matters which are without the scope of the partnership business.

The law is well settled, as claimed by defendants' counsel, that one partner cannot bind the firm by any contract made in the name of the firm, unless it be in a matter within the scope of the partnership dealings or falling within the ordinary business and transactions of the firm: *Western Stage Co. vs. Walker*, 2 Iowa 512, 65 Am. Dec. 789; Story on Partnership, § 322. Looking at all the instructions given in this case, and at the testimony contained in the record, we cannot say that the court undertook to lay down a different rule, or that there was error in refusing the instructions asked. The respective letters of Adams & Hackley to plaintiffs of June 19, 1854, though signed in their individual names, were evidently written in the name and upon the business of the firm. Adams says: "Your advertisement of pianos is in our paper, and your offer to us of an agency we accept." Attached to this is the letter of Hackley in which he says: "I think you would promote your own interests by shipping to us a small but select assortment of your instruments." The jury were told that "they must be satisfied that the business of buying and selling pianos was within the scope of the partnership business, or that defendants jointly and as copartners specially ordered the pianos before a joint liability was incurred." By this instruction the question of fact was left for the determination

of the jury whether the dealing in pianos had been made a part of the business of the firm. And from the evidence we think they were authorized to infer that the defendants concurred in accepting, in the name of the firm, the agency offered them by plaintiffs, and had agreed to add to their regular partnership business that of dealing in pianos.

It is to be observed that defendants in their letters to plaintiffs make no stipulation as to the terms on which the pianos are to be sent to them. Nothing is said of their being sent to be sold on commission. They accept the agency, and advise plaintiffs to send on their pianos to them. In reply the plaintiffs inform them that they do not consign pianos to be sold on commission—they decline all such applications. They have, however, shipped to defendants two pianos on these terms; that they are to be at the risk of the defendants when delivered at Albany on the railroad or canal, and all sales are to be at defendants' risk; that the pianos are sold to them at the usual rates; but they agree to wait with defendants for payment until the pianos are sold by them, charging them interest on account after four months; and that if the defendants choose to purchase the pianos "out and out" twenty per cent. will be deducted from the invoice price at six months' credit—if for cash a discount of five per cent. additional will be made. Upon these terms the first two pianos were shipped to defendants. Upon notice to them of the terms of the plaintiffs, if not acceptable to them, they should have notified plaintiffs of their dissent and their refusal to receive the pianos. Instead of this Hackley, one of the defendants, writes to plaintiffs from the "Tribune" office, September 29: "We have just effected a sale of your two pianos at six months." Having made the dealing in pianos a part of their partnership business, and notified plaintiffs thereof, this letter, though written and signed by Hackley alone, binds the firm. There is no expressed dissent to the terms on which the pianos were sold to them, and no unwillingness manifested to continue the business and agency on the same terms. On the contrary, they inform the plaintiffs that they "have a prospect of selling two or three more if they had them." In accordance with this suggestion the remainder of the pianos charged are shipped to defendants.

Where a partnership firm, embarked in a particular business to which their engagements are confined, and to which alone

their partnership contracts extend, by mutual agreement, enlarge the sphere of their operations, and include another branch of business, the power of each partner to bind the firm by his contracts is co-extensive with the whole business of the partnership; and the acts of each member are as binding on the firm in the new branch of business in which they are engaged as they are in the former regular and ordinary business. If Adams & Hackley agree to add the business of dealing in pianos to their regular business of printing and publishing newspapers, the acts of each member of the firm are binding on the other in everything connected with the buying and selling of pianos, and neither can object that the other partner makes contracts or incurs liabilities in the name of the firm, which, by virtue of the relation existing between them, shall bind them both. It was not necessary, therefore, in our view of the law and the facts, that the plaintiffs should prove that Adams had knowledge of all the transactions which passed between his copartner and the plaintiffs, and that he consented thereto. He is presumed to consent to all the acts of his partner within the scope of the business of the firm.

The second assignment of error is upon the refusal of the court to charge the jury "that if the letter of Boardman & Gray does not accept the offer and terms stated by Adams, it is necessary to bring home to Adams a knowledge of the contents of the letter of Boardman & Gray." The refusal to give this instruction was not erroneous. No offer of terms was made by Adams in his letter to plaintiffs. He informs them that the offer to their firm of an agency for the sale of their pianos is accepted by defendants, and advises plaintiffs that they had better have one of their pianos in Dubuque. Having accepted the agency proposed, and agreed to make the dealing in pianos a part of their business as a partnership, Adams, as one of the partners, is equally and jointly with Hackley liable for all pianos sold and delivered to the partnership firm. Even if Adams never saw or knew anything of the letter of plaintiffs, he is bound by the acts of his copartner.

Judgment affirmed.

NOTE:—See Mechem's Elem. of Partn., § 167; *Latta* vs. *Kilbourn*, *ante*, p. 260.

## PORTER vs. CURRY.

*Supreme Court of Illinois, 1869.*

50 Ill. 319, 99 Am. Dec. 520.

**Assumpsit by Porter against Curry and Majors, as partners, for the balance of the price of a mare, claimed to have been sold by the plaintiff to the defendants. Curry alone was served. The defendant had a verdict and judgment, and the plaintiff appealed.**

***Skinner* and *Marsh*, for the appellant.**

***Warren* and *Wheat*, for the appellee.**

LAWRENCE, J. Curry and Majors were partners in the manufacture of wagons, and in August, 1867, sold a wagon to Porter, the appellant, for $110, for which he gave his note. Soon afterwards Porter, by an arrangement with Majors, sold the latter a mare for $200, and received therefor his own note and one executed by Majors for $90. Porter swears, however, that Majors claimed to be purchasing the horse for the use of the firm, and on the credit of the firm, and that he himself supposed that he was taking the firm note, instead of the individual note of Majors, and not being able to read did not discover his error until Majors absconded and he showed his note to a neighbor. Majors absconded to Missouri a few days after the purchase, taking with him the mare. Curry pursued Majors, obtained possession of the mare, and sold her. Porter brought this suit against the firm to recover the $90, and it is resisted on the ground that the mare was not required in the business, and therefore Majors had no power to buy her on the firm credit.

It is clear, however, even if the purchase of a horse was not within the scope and usage of such a partnership as existed between Curry and Majors, yet if the mare was in fact purchased on the firm credit, and if Curry afterwards claimed her from Majors as firm property, and obtained possession of her on that ground, he thereby ratified the act of Majors in buying her on the partnership credit. He cannot be permitted at the

same moment to claim the benefit of the purchase and deny its obligations. This view of the law was embodied in the sixth and seventh instructions asked by plaintiff, and they should have been given. For the same reason, the first instruction given for the defendant should have been refused. It puts the case to the jury wholly on the question of an original power by Majors to buy on the firm credit, and makes the case turn entirely upon that, leaving the question of ratification altogether out of view.

The judgment is reversed and the cause remanded.

Judgment reversed.

NOTE:—See Mechem's Elem. of Partn., §§ 176, 190.

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## PEASE vs. COLE.

*Supreme Court of Connecticut, 1885.*

53 Conn. 53, 22 Atl. Rep. 681, 55 Am. Rep. 53.

Action by Ernest M. Pease against Charles H. Cole and Daniel McCarthy on a note executed by McCarthy in the firm name of defendants to J. B. McCarthy, father of Daniel McCarthy, and by him indorsed to plaintiff.

Judgment for plaintiff, and defendant Cole appeals.

*G. G. Sill* and *H. S. Sanford*, for appellant.

*L. E. Stanton* and *S. F. Jones*, for appellee.

LOOMIS, J. The question involved in this case is whether one member of a copartnership formed for the purpose of conducting a theater in Hartford could, under the circumstances mentioned in the finding, bind the other member by executing a negotiable promissory note in the name of the firm for money borrowed. The finding, in terms, excludes all express authority of the other partner, and even all knowledge of the matter on his part. So that any conclusion that the note is the note of the firm, rather than of the member executing it, must necessarily rest on an authority to be implied. But here, again, the facts found so circumscribe the range of inquiry as

to exclude all the ordinary sources of such authority. The circumstances from which an authority may be implied are identical with those involved in a question of ordinary agency, for each partner is regarded as the accredited agent of the rest. In many cases the decisive fact is found in the customary course of dealing; but not so here, for it is found that the note in question was the only note ever given in the name of the firm. The copartnership first commenced business in August, 1883, and on the 24th of the same month the note in suit was given. There was therefore very little time for a course of conduct or usage of any sort to grow up, giving any apparent authority. The finding traces the money borrowed only into the hands of McCarthy, the partner who signed the firm name, and no fact appears showing directly or presumptively, that the act was necessary for any of the purposes of the partnership. The only remaining source from which an authority may be derived by implication must be sought in the nature and scope of the partnership and in the nature of the act; and here, if we examine the legal principles that are applicable, it will be found, not only that all such implication is wanting, but that the presumption is directly against the authority assumed. The weight of authority in the United States, and the uniform tenor of the authorities in England, will be found to establish a controlling distinction in respect to implied authority between commercial or trading and non-trading partnerships. Story, Partn. (6th Ed.) § 102*a*; 1 Lindl. Partn. (4th Ed., by Ewell), top p. 266, and note 1, and cases there cited; 1 Colly. Partn. 648, 658; Metc. Cont. 121, and cases cited in the notes.

In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business; and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions. But when we pass to non-trading partnerships the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by one partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had

been invested by his copartners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it. That the partnership in question belongs to the non-trading class seems so obvious as to need no discussion. The brief in behalf of the defendant Cole cites many cases, and gives a long list of pursuits and professions which those cases establish as of the non-trading class, and, although the conduct of a theater is not there mentioned, yet the analogies manifestly include it. To show the existence of the distinction contended for, and its application, we select from a multitude of authorities the following in addition to those previously referred to:

In *Judge vs. Braswell*, 13 Bush, 67, 26 Am. Rep. 185, the defendants were partners under an agreement to engage in mining business upon lands then leased or which might be thereafter acquired. One of the members of the firm purchased, without the others' consent, and took conveyances of, mining land in the name of the firm, and gave the bills of the firm therefor. In an action by the payee of the bills against the firm, a defense was made by the other partners that the purchase was without their consent or ratification, and in the plea they renounced all claim to the lands purchased. The court held that the firm was not liable on the bills, saying that the power of one partner to bind his copartners rests alone on the usage of merchants, and does not amount to a rule of law in any other than commercial partnerships. In non-commercial partnerships, one who seeks to hold the firm bound upon a contract made by a single member must be able to show, either express authority, or that such is the customary usage of the particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his copartners with the requisite authority.

In *Hedley vs. Brainbridge*, 3 Q. B. 316, the defendants were attorneys in partnership, and one of the partners gave a note in the name of the firm to the plaintiffs for the balance of advancements made to one partner who was acting in behalf of the firm. The advances were to be laid out on mortgage by the firm. Lord DENMAN, C. J., in giving the opinion, said: "No doubt a debt was due from the firm; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards

third persons, to bind the firm by bills of exchange, for it is the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments, nor is it necessary for the purposes of their business. * * * Upon the whole, we think that the implied authority is confined to partners in trade."

In *Dickinson vs. Valpy*, 10 Barn. & C. 128, the plaintiff was an indorsee for value of a bill of exchange drawn and accepted in the name of a mining partnership by order of its regular directors. It was held incumbent on the plaintiffs to prove that the directors had authority to bind the company, and that it was necessary, for the purpose of carrying on the business of the company, or usual for other similar mining companies, to draw or accept bills of exchange. Opinions were given by Lord TENTERDEN, C. J., and Judges BAYLEY, LITTLEDALE, and PARKE, and the same distinction was made as in the other cases between trading and non-trading partnerships. See, also, *Greenslade vs. Dower*, 7 Barn. & C. 635.

In *Levy vs. Pyne*, tried before Baron ALDERSON, 1 Car. & M. 453, it was held that, "if a bill of exchange or promissory note be drawn, accepted, or indorsed by one of two persons who are partners in a business which is not a trade (*e. g.*, as attorneys), in the name of the firm, * * * the plaintiff must give evidence of the authority of the other partner to draw, accept, or indorse in the name of the firm; but in the case of a commercial firm, this is not necessary, as there is a general authority." See, also, *Rickards vs. Bennett*, 1 Barn. & C. 223; *Garland vs. Jacomb*, L. R. 8 Exch. 218.

In *Smith vs. Sloan*, 37 Wis. 285, 19 Am. Rep. 757, the court, by LYON, J., after an able and exhaustive review of the authorities, adopted the following proposition as fully sustained: "We gather from all the authorities that the distinction between a trading and a non-trading partnership, in respect to the power of a partner to bind his copartner by negotiable instruments, is not limited to a mere presumption of such authority in one case, and the absence of such presumption in the other, as the learned counsel for the plaintiff argued; but we think, and must so hold, that one partner in a non-trading

partnership cannot bind his copartner by bill or note, drawn, accepted, or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm's business, or is usual in similar partnerships; and the burden is upon the holder of the note, who sues upon it, to prove such authority, necessity, or usage."

In *Ulery vs. Ginrich*, 57 Ill. 531, the partnership was for farming purposes, and the note in suit was given by one in the name of the firm for money borrowed. It was held to be a non-trading firm; and the same principles were adopted as in the cases previously cited. In *Hunt vs. Chapin*, 6 Lans. 139, it was held, MILLER, P. J., giving the opinion, that the rule which authorizes one member of a copartnership to bind the firm is only applicable to business of a trading nature, and has no application to partnerships for agricultural purposes, or others of a similar character. See, also, *Kimbro vs. Ballitt*, 22 How. 256; *Graves vs. Kellenberger*, 51 Ind. 66; *Bank vs. Snyder*, 10 Mo. App. 211.

In Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes, and Cheques (2d Ed. pp. 68, 69), the following propositions are laid down as well-settled rules: "Art. 77. A partner in a trading firm has *prima facie* authority to bind the firm by drawing, indorsing, or accepting bills in the firm name for partnership purposes; and, if the bill get into the hands of a holder for value without notice, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not. Art. 78. A partner in a non-trading partnership has *prima facie* no authority to render his copartners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible."

Many more authorities equally pertinent might be cited, but these will suffice to show that the distinction relied upon is strongly supported both in England and in the United States. While we feel constrained to adopt the distinction between the two classes of partnership so far as the presumption of authority or the want of it is concerned, we do not deem it necessary for the purposes of this case, or even quite reasonable, to carry its application so far as to deny absolutely, as some of the cases do, the right to recover on a note given by a non-trading

firm for money borrowed for the firm and appropriated to its use, or on a note given in payment of its debts. Some authorities ignore the test of liability referred to, but adopt another, which is equivalent in result. Chancellor Kent, in his chapter on partnerships in the third volume of his Commentaries (7th Ed. p. 44), omits the use of the terms "trading" and "non-trading," and makes the distinction between partnerships, in respect to the power of one partner to bind the firm, depend on the single test of the usual scope of the business, in connection with the subject-matter of the contract. This rule was adopted in *Crosthwait vs. Ross*, 1 Humph. 23, 34 Am. Dec. 613, where it was held that one partner in the practice of medicine could not bind the firm by drawing a bill or note on which to raise money, because it was not within the scope of the partnership business. Though under a different name, the real distinction here taken is between partners in trade and partners in an occupation. Afterwards the same court, in the case of *Pooley vs. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 783, in a most able and elaborate opinion, held that the liability of a partnership firm of the non-trading class to a *bona fide* holder of negotiable paper without notice, upon a note endorsed in its name by a member for his own benefit, would depend upon the nature of the business, the usage of trade, and the course of dealing of the particular firm. It was also held that, where the nature of the partnership is such that it may or may not be proper to deal in negotiable instruments (as in that case, which was a publishing company), it was error in the circuit judge to charge, without qualification, that the firm was liable if the holder received the note before maturity, in the due course of trade, and without notice. We think the same principle, under the circumstances of the case at bar, made it error in the court below to hold the firm liable. This court hitherto has had no occasion to give prominence to the distinction under discussion. The nature of the partnership business has, however, been made a ground for a presumption and a test of liability. In *Walcott vs. Canfield*, 3 Conn. 194, the defendants were partners in running a line of stages from Hartford to Albany and back. One of the partners by an advertisement promised to transport passengers and leave them at Albany in a specified time, upon which agreement the suit was based. The advertisement, being the act of one partner, was held not even

admissible in evidence against the firm, without previously establishing the authority of that one to bind the others. HOSMER, C. J., in delivering the opinion, on page 198, said: "A copartnership formed to transport passengers and their baggage in a stage does not authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance within a specified time. Unless he had special authority, he could only obligate himself by a contract not within the scope of the connection, and not his partners, who have never expressly or impliedly assented." The subject-matter of the contract was different from the case at bar, but it seems even more closely connected with the scope of the business than the giving of the note in suit.

Many authorities lay down the unqualified proposition, as if it was applicable to all partnerships, that if one partner raises money on a negotiable bill or note signed or indorsed in the name of the firm, and which comes into the hands of a *bona fide* purchaser, the partnership is bound, although it was in fact for the individual use of the acting partner. The doctrine is so stated in substance by this court in *Insurance Co. vs. Bennett*, 5 Conn. 574, 13 Am. Dec. 109. The case shows that the partnership was a commercial one. We do not say, however, that public convenience does not demand the same rule in the case of non-commercial partnerships, where the holder was not advised of the nature of the partnership and its course of dealing, or of other circumstances to put him on inquiry, and where the circumstances would justify the belief that he was dealing with the partnership. We may well leave this for future consideration, for, upon the facts found, we think the plaintiff's right was impaired by reason of what he knew in connection with the circumstances. We do not forget that the court below, in terms, found that the plaintiff purchased the note in good faith without notice of any defect. This, of course, means simply that there was no actual bad faith and no actual notice, and, as matter of fact, it is final; but at the same time the court found special facts as to the plaintiff's knowledge and action which we must also consider, and, if we find constructive notice or constructive fraud, the law must prevail.

The plaintiff, as holder, must stand affected by the nature of the partnership, of which he was fully advised. He purchased the note in the face of the presumption that it was

unauthorized. To show the general nature of the facts which courts have held to be constructive notice, we cite a few cases. In *Livingston vs. Roosevelt*, 4 Johns. 278, 4 Am. Dec. 273, A and B formed a copartnership under the style of A & Co., in the business of sugar refining, and so advertised in the newspapers. B afterwards, without the knowledge of A, bought a quantity of brandy, for which he gave a note indorsed by him with the name of the firm. The plaintiff, who was an indorsee of the note, took the newspaper in which the firm's business was advertised. KENT, C. J., after commenting on certain facts tending to show that the plaintiff knew that the purchase of the brandy was not a partnership concern, proceeded to lay down these principles: "But if the plaintiff did not in fact know that the purchase was made by C. I. Roosevelt on his own account, and acted under the mistaken impression that it was a partnership purchase, still the firm were not bound by the indorsement, because the facts disclosed amounted to constructive notice or notice in law. * * * When a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be circumstances to destroy that presumption. 'If,' says Lord ELDON (*Ex parte* Bonbonus, 8 Ves. 544), 'under the circumstances the person taking the paper can be considered as being advertised that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting-house, the sign, etc., are the usual and regular *indicia* by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. * * * When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals." In 1 Collyer on Partnership (page

650) it is said that "a note given by one partner in the partnership name, within the scope of the partnership, is binding upon the firm, but the payee is bound to know whether it is within the scope of his apparent authority, and, if it is in excess thereof, the firm is not responsible." In *Cocke vs. Bank*, 3 Ala. 175, the note in suit was signed in the partnership name of J. F. & W. Cocke, who were partners in keeping a tavern. It was executed by J. F. Cocke, and payable to Lea & Langdon for their accommodation, without the knowledge of the other partner, Woodson Cocke. No actual knowledge of the circumstances was shown on the part of the bank, which sued as indorsee; but it was assumed to have been the duty of the bank to make inquiry. GOLDTHWAITE, J., in delivering the opinion, said (page 180): "The law presumes that the bank, if it inquired at all into the partnership of the defendants, must have received information that they were not partners in a mercantile trade, but only in the business of tavern-keeping. This ascertained, it took the note at its peril, and must have relied on the faith of the indorsers." It was held that Woodson Cocke, the partner who had no knowledge of the transaction, was not liable.

In the case at bar the plaintiff had full and actual knowledge of the nature of the partnership, and the law attributed to him knowledge, also, that one partner could not bind the other by bill or note without authority, and knowing, as he did, that the note had been written and signed by McCarthy, who was irresponsible, and that, if he purchased it, it would be upon the credit of Cole alone, and having also actual knowledge of a course of dealing which avoided McCarthy and pointed to Cole alone as the financial representative of the firm, it seems to us the plaintiff took the note at his peril. It was very strange for the plaintiff to inquire of the one who had used the firm name if it was the note of the firm, and omit entirely, when he had ample and easy opportunity, to inquire of the other partner, on whose sole credit he depended; but the court has found that the failure to inquire of Cole was not owing to a belief that the inquiry would result in finding the note invalid, and this we must accept as true. Ordinarily such a finding would save the rights of a holder in good faith of negotiable paper, but the great difficulty in the present case is that the note was purchased with constructive notice that it

was not within the apparent scope of the partnership business, and *prima facie* was not the note of the firm; and the actual course of business, so far as it was known to the plaintiff, tended to increase rather than allay the suspicion of a want of authority.

But the plaintiff contends that the judgment in his favor cannot be disturbed because the burden of proof was on the defendant. On this general subject of the burden of proof, most of the authorities cited in another connection to show the distinction between the two classes of partnerships, and many others that we might cite, assert most positively that in the case of non-commercial partnerships the burden is on the holder of the note. But we concede that many cases can be found which in terms would seem to place the burden on the defendant. In some of these cases the partnerships were in fact commercial, as in the case of *Faler vs. Jordan*, 44 Miss. 283. In *Doty vs. Bates*, 11 Johns. 544, PLATT, J., giving the opinion, said: "The partnership being admitted, the presumption of law is that a note made by one partner in the name of the firm was given in the regular course of partnership dealings until the contrary is shown on the part of the defendants." The case is so brief in the report that we cannot see clearly what was involved in the admission of the partnership which furnished the basis for the presumption. It incidentally appears in the description of the firm that its business was tanning, currying, and shoe making. This, doubtless, involved the buying of hides, bark, and materials for tanning, and the sale of leather and shoes. The basis of the presumption was doubtless the apparent scope of the business. In *Holmes vs. Porter*, 39 Me. 157, the head note omits an important qualification. The proposition laid down by the court is that, "when the contract is made in the name of the firm, it will *prima facie* bind the firm unless it is ultra the business of the firm." The head note omits the last clause. The case of *Carrier vs. Cameron*, 31 Mich. 373, 18 Am. Rep. 192, was relied upon by the plaintiff to show that the burden was on the defendant. In terms it so holds, but a brief analysis will show that it is not inconsistent with our position in this case, and will suggest a mode of reconciling many apparently conflicting cases. There was nothing at all in the case to show the nature of the partnership, and the plaintiff's knowledge of it. GRAVES, C. J., in

giving the opinion, stated the question as follows: "Was the plaintiff below required, in order to make out a *prima facie* case, to show at the outset that Carrier had express authority to make notes generally, or else to show either that the copartnership was one of the class in respect to which such authority is presumed, or that its course of business had been such as to imply authority, or that the signing by Carrier had been approved or ratified?" The question was answered in the negative, upon the authority of *Littell vs. Fish*, 11 Mich. 525. It is to be noticed that the question was simply as to the burden of proof after the fact of partnership was admitted, and before the nature or class of the partnership appeared. That being the position of the case, the court well remarked that "it was not needful for the plaintiff, by any positive averment or positive proof, to negative a defense which, in virtue of a general presumption, would be intended not to exist. He could not be required to go into particular proof on such a point until some proof should appear in contravention of the presumption." In this statement of the law we fully concur, but it is not applicable to the facts in the case at bar, because the controlling fact in the proposition is wanting. Proof in contravention of the presumption, which at the outset was in favor of the plaintiff, had appeared, and had resulted in the finding of the opposing facts; and it is significant that all the facts which the above question impliedly concedes to be sufficient to overcome the presumption referred to are distinctly found, namely, that there was no express authority to make notes generally or to give this note; that the partnership was of the non-trading class, in respect to which no authority can be implied; that there was no course of business that could imply authority; and that the giving of this note had never been ratified or approved by Cole. Whatever presumption, therefore, there might have been in favor of the plaintiff at the outset had been fully overcome, and, if there exists any further fact from which an authority might be implied, the plaintiff must show it, or lose his case.

It is manifest that in the Michigan case, as, indeed, in all the cases treating of the burden of proof in suits on notes alleged to have been executed by partnerships, an illegitimate use has been made of the term "burden of proof." Properly, it is applied only to a party affirming some fact essential to the support of his case. Thus used, it never shifts from side to side

during the trial. Loosely used, as in the cases referred to, it is confounded with the weight of evidence, a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome; and, in this indiscriminate use of the term "burden of proof," much of the apparent conflict in the cases has its origin. For, after all, the test of the burden of proof is very simple, and so is the question of the weight of evidence, and there is no contrariety in the principle adopted by the authorities. In the light of principle, we think it may be demonstrated that the position of the plaintiff is untenable. A partnership has been sued on a note executed in its name. Upon the trial the note is produced by the plaintiff, and the first question is, was it the note of the firm? The plaintiff takes the affirmative of this issue, because, if no evidence is offered on either side, he must fail. He has then the burden of proof, and it remains on him, and does not pass at all to the defendant. But suppose now it is shown or admitted that the partnership alleged exists, and that one of the firm executed and delivered the note in its name. By virtue of the general presumption that authority was given by the partnership, the plaintiff is entitled to recover, if nothing further appears, because the weight of evidence is on his side. But suppose the defendants take their turn, and prove the identical facts here found, that there was no authority, general or special, given; no ratification of the act; no course of dealing to imply authority; and, furthermore, that the partnership was of a class from which no authority can be implied. Is the plaintiff now entitled to a verdict? Has he proved that the note was the note of the firm? Surely not. What, then, is left on which to rest his case? The preponderance of evidence is not with him. The burden upon him to show that it was a partnership note has not now been met. But it is said that there is a realm of inquiry not touched by either party; that is, that it was not shown whether or not the partnership had the benefit of the consideration of the note. If such a fact appeared, we concede, for the purposes of this case, that it would tend to show that the note was the note of the firm. But if any authority could not be implied as the case stood before, can it now be implied? The case stands precisely as before. There can be no change

in the weight of evidence, because nothing has been added; and the claim of the plaintiff would seem to be reduced to the absurdity that he is to have the same benefit from an unproved fact as from one proved. There was error in the judgment complained of, and, as against the defendant Cole, it is reversed, and a new trial ordered. The other judges concurred, except GRANGER, J., who dissented.

NOTE:—For other cases upon the power of one partner to bind the firm by negotiable instruments, see Mechem's Elem. of Partn., § 174.

For the distinction between trading and non-trading firms, see *Id.* § 162.

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## DOWLING vs. EXCHANGE BANK OF BOSTON.

*United States Supreme Court, 1892.*

145 U. S. 512.

The court stated the case as follows:

Edward P. Ferry, of Grand Haven, Michigan, and George E. Dowling and Frank H. White, of Montague, in the same State, entered, February 1, 1873, into written articles of co-partnership, "for the purpose of carrying on the business of sawing lumber, pickets and laths at the said village of Montague, in the steam saw mill lately there erected," the name of the firm being F. H. White & Co., and the partnership to continue for the full term of five years, unless sooner dissolved by agreement. Of the the capital of the firm Ferry contributed one-half, and Dowling and White one-fourth each.

By the written terms of the partnership, no part of the capital was to be diverted or used by either partner, otherwise than in the business; the profits and losses were to be shared according to their respective interests; Ferry and Dowling were to have the care and charge of securing the sawing for the mill, the supervision of the financial part of the business and of the firm's books to be divided between them, as they might agree without charge for their services; and White was to have full management of the work of sawing, of hiring and discharging of men and fixing

their wages, keeping double entry books, which should be open at any time for the inspection of the partners, and receiving for his services one thousand dollars, to be paid by the firm. It was further provided that the books of the firm should be closed as of January 31, in each year, the profits then to be ascertained and passed to the credit of the respective partners, and applied in a specified way.

At the date of the several transactions out of which this litigation arose there was a firm, Ferry & Bro., at Grand Haven, Michigan, engaged in business as manufacturers of and dealers in lumber and shingles. It was composed of Thomas W. Ferry and Edward P. Ferry.

The present action involved the question of the liability of F. H. White & Co. upon three promissory notes, bearing date, respectively, Montague, Michigan, October 17, 1882, November 27, 1882, and January 15, 1883, and for the respective sums of $5,288.75, $5,100.73 and $5,391.90, and payable, each, four months after date, to the order of Ferry & Bro., "at the National Exchange Bank, Boston, Mass., value received." Each note was endorsed by Thomas W. Ferry, in the name of Ferry & Bro., and was sold by him, acting in the name of his firm, to that bank. Neither White nor Dowling — whose firm continued in business under the above articles of partnership until May 31, 1883 — had any knowledge of the existence of these notes until after their respective maturities, nor until shortly before the commencement of this action. Neither authorized the notes to be given. They were gotten up by Thomas W. Ferry, with the aid of Edward P. Ferry and one Thompson, the bookkeeper of Ferry & Bro., the latter acting under the direction of Thomas W. Ferry. The proceeds were used for the benefit of Thomas W. Ferry, or of his firm. The firm name of F. H. White & Co. to each note was signed by Edward P. Ferry, who did not communicate to White and Dowling that he had done so.

Separate actions having been brought by the bank upon the notes, they were, by consent, consolidated. Before the order of consolidation was made Dowling filed in each action his affidavit, stating that "on the 17th day of October, 1882, he was, and still is, a member of the copartnership firm of F. H. White & Co., of Montague, Michigan; that said firm was at said time, and still is, composed of Edward P. Ferry, Frank H. White and this deponent as co-partners;" that "he never executed the

promissory note a copy of which was served upon him with the plaintiff's declaration;" that "the signature thereto is not in the handwriting of this deponent; and that said promissory note was not executed by any person having authority to bind this deponent or to bind the said defendants, Edward P. Ferry, Frank H. White and this deponent jointly upon said promissory note."

A verdict was returned in favor of the plaintiff for $17,791.45, the court saying to the jury: "Regretting very much that these defendants White and Dowling, who alone make defense here, are in such a situation that they must suffer from the wrongdoing of their associate, the court is unable to relieve them without violating principles of law which are essential to the security of mercantile business, and violating also the rights of parties innocent of the wrong. As there is, in the opinion of the court, no question of fact about which there is any conflict in the evidence, the court holds that, giving effect to the testimony, the plaintiff is entitled to a verdict, and you are instructed to find accordingly against all the defendants." The opinion which preceded this charge is reported in 30 Fed. Rep. 412.

Judgment having been rendered upon the verdict, a severance was duly had between the defendants, so as to authorize a writ of error in the name of Dowling alone.

*Mr. Michael Brown* (with whom was *Mr. J. C. Fitzgerald* on the brief) for plaintiff in error.

*Mr. Mark Norris* (with whom was *Mr. Lyman D. Norris* on the brief) for defendant in error.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

It is not disputed that the execution by Edward P. Ferry, in the name of F. H. White & Co., of the notes in suit was without express authority of his partners, and that neither of the notes was given or used in the business of that firm. The primary question therefore is, whether, for the protection of the plaintiff a *bona fide* purchaser for value, it will be conclusively implied, as matter of law, from the nature or course of the firm's business, that Edward P. Ferry had authority from his partners to make those notes or either of them.

Mr. Justice Clifford, speaking for the court in *Kimbro vs.*

*Bullitt*, 22 How. 256, 268, said that "wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation," citing, among other cases, *Winship vs. Bank of United States*, 5 Pet. 529, 561. Mr. Justice Story said that the doctrine that each partner may bind the firm by bills of exchange, promissory notes and other negotiable instruments is generally limited to partnerships in trade and commerce, and does not apply to other partnerships unless it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary for the due transaction thereof. Story on Partnership, sec. 102, a.

In *Irwin vs. Williar*, 110 U. S. 499, 505, Mr. Justice Matthews, speaking for the court, said: "The liability of one partner for acts and contracts done and made by his copartners, without his actual knowledge or assent is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the ordinary and usual course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partners sought to be charged." Again: "What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities, and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members.

The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the rights of the public and the duties of the partners."

It is very clear that the articles of agreement between Ferry, White and Dowling did not create a partnership, each member of which had, under the settled rules of commercial law, and as between the firm and those dealing with it, authority to give negotiable paper in its name. The firm was of the class denominated in many adjudged cases as non-trading or non-commercial firms, the members of which could not be held, as matter of law, and by reason of the nature of the partnership business, to have authority to execute negotiable instruments in the name of the firm.

We quite agree with the learned judge who presided at the trial that the liability of a partnership upon negotiable instruments executed by one partner in the name of the firm exists not only where the firm is a trading or commercial partnership, but "where the actual course of business pursued adopts the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur." But the difficulty in this case is that the jury were not permitted to determine, from a consideration of all the circumstances of the case, what, in view of the admitted nature of the business of F. H. White & Co., was necessary and proper to its successful operation, what was involved in the usual and ordinary course of its management by those engaged in it, or what should be inferred from the actual course and conduct of the partnership, so far as it was known, or ought reasonably to have been known, to the parties sought to be charged with liability on the notes in suit. We do not deem it necessary to make a detailed statement of the numerous facts disclosed by the evidence, or to suggest what inference might be drawn from them. It is sufficient to say that the issue as to whether the defendants were estopped to dispute the authority of Edward P. Ferry to make the notes in suit, in the name of F. H. White & Co., was one peculiarly for the jury, under all the facts indicating the nature, necessities, and course of business of the firm, and under proper instructions from the court as to the legal principles by which they should be guided in determining the case.

We think the court erred in holding, as matter of law, that the jury were not at liberty, under any view of the facts, to find for the defendants. It seems to us that a verdict in their favor would not have been so palpably against the evidence as to have made it the duty of the court to set it aside and grant a new trial.

The judgment is reversed as to the defendant Dowling, who alone prosecutes this writ of error, with directions to grant him a new trial.

NOTE.—See Mechem's Elements of Partn., § 174.

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## MORGAN VS. RICHARDSON.

*Supreme Court of Missouri, 1852.*

16 Mo. 409, 57 Am. Dec. 235.

This was a proceeding to set aside a judgment entered against A. & J. M. Richardson, partners, upon a promissory note executed in the name of the firm. The judgment was entered upon a confession made by J. M. Richardson alone, after the dissolution of the partnership. The execution was levied upon the property of A. Richardson. The court below set aside the judgment against A. Richardson and quashed the execution. Plaintiff appeals.

*Leonard*, for the appellants.

*Hayden*, contra.

SCOTT, J. The facts in this case stand admitted by the demurrer to the petition, and we are at a loss to conceive the ground upon which the proceeding can be sustained against A. Richardson. The case of *Green vs. Beals*, 2 Caines (N. Y.) 254, is an authority to show that the judgment confessed by J. M. Richardson was void as to A. Richardson. The cases of *Motteux vs. St. Aubin*, 2 W. Blackst. 1133, and *Denton vs. Noyes*, 6 Johns (N. Y.) 298, 5 Am. Dec. 237, are not applicable to the circumstances of this case. It cannot be maintained that a

partner, either before or after the dissolution of the copartnership, has authority to confess a judgment for his copartner. The authorities are abundant to show that one partner cannot confess a judgment which will bind his copartner: *Crane vs. French*, 1 Wend. (N. Y.) 311; *McBride vs. Hagan*, Id. 327. We can see no difference in principle between setting aside the judgment and restraining an execution upon it, as either mode of action is based upon the nullity of the proceeding, which is not permitted to be used as a foundation for any future action against the party for whom it has been unwarrantedly entered. It does not appear that the judgment against J. M. Richardson has been vacated, nor will we interfere with it.

Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 179.

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## FOX vs. NORTON.

*Supreme Court of Michigan, 1861.*

9 Mich. 207.

Norton and others sued Charles R. Fox, Thomas D. Gilbert and Francis B. Gilbert on a bond. The bond, which was received in evidence against defendants' objection, described the obligors as Charles R. Fox and Gilbert & Co. It was conditioned that said Fox and Gilbert & Co. should pay, etc.; and was signed thus:

CHARLES R. FOX [Seal].
GILBERT & CO. [Seal].

Judgment for plaintiff and defendants bring error.

*Withey & Gray*, for plaintiffs in error.

*J. T. Holmes*, for defendants in error.

CHRISTIANCY, J. (After stating the facts.) The individual names of the Gilberts do not appear upon the bond. It was, however, proved that Thomas D. Gilbert and Francis B. Gilbert were, at the date of the bond, partners composing the firm of Gilbert & Co., and that the said Thomas D. Gilbert executed

the bond in the name of the firm. But no evidence was given or offered showing or tending to show that the bond was executed by the single partner in the presence of the other partner, nor that the other partner had previously assented to its execution, nor that he subsequently recognized or ratified it as the act or obligation of the firm.

We understand the general rule of law to be well settled that (with the exception of the release of a debt, which stands upon peculiar ground) one partner cannot execute a specialty binding as such upon the firm, without express authority for that purpose under seal. The English decisions recognize but a single exception to this rule, and that is when the single partner executes the instrument in the presence and with assent of the other member or members of the firm. But, by the general current of American authorities, the instrument may also be sustained against the firm by proof of prior parol assent, or subsequent parol ratification by the other member. We are aware of no case which goes further. See the authorities collected in Story on Cont. §§ 218, 220; Story on Partn. § 117, *et seq.*; Collyer on Partn. (Perkins Ed.) §§ 462 to 467.

The bond in this case was not admissible under the general rule, and no evidence was given tending to bring it within any of the recognized exceptions to the rule. It was therefore improperly admitted. The bond not being in evidence, and all the other questions raised in the case being dependent upon the bond, such dependent questions have no bearing upon the case before us, and we do not deem it necessary to notice them here.

Reversed.

NOTE: See Mechem's Elem. of Partn., § 168.

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## SHATTUCK vs. CHANDLER.

*Supreme Court of Kansas, 1888.*

40 Kan. 516, 20 Pac. Rep. 235, 10 Am. St. Rep. 207.

Chandler, as assignee of the firm of Pierpont & Tuttle, sued Shattuck and Bowers, upon the notes referred to in the opinion. Plaintiff had judgment below and defendants bring error.

*Don Carlos & Son*, for the plaintiffs in error.

*A. G. & W. H. McBride*, for the defendants in error.

CLOGSTON, C. This was an action upon a large number of promissory notes made payable to Pierpont & Tuttle, and guaranteed by the firm of Shattuck & Bowers in these words: "For value received, I hereby guarantee the payment of this note according to the terms thereof, waiving demand, notice, and protest. Shattuck & Bowers." The evidence shows that Pierpont & Tuttle were a manufacturing firm, located at Bushnell, Illinois, and that Shattuck & Bowers resided in Phillips county, Kansas, and were engaged in the sale of agricultural implements. Certain agricultural implements furnished by Pierpont & Tuttle were sold by Shattuck & Bowers, and the notes sued on were taken in payment therefor, said notes being made payable to Pierpont & Tuttle, and before delivery to them were guaranteed as above stated. In answer to the petition, the defendant alleged, among other defenses, that the plaintiff was not the assignee of Pierpont & Tuttle, and that he had no right or authority to bring the action; and also alleged that Pierpont & Tuttle had failed to collect the notes when the same were due and payable; that the makers of the notes were solvent at that time, and afterward became insolvent and non-residents of Kansas.

The plaintiff offered in evidence the notes sued on, and the deed of assignment made in Illinois by Tuttle in the firm name of Pierpont & Tuttle; also a deed of assignment by Tuttle as the surviving partner of Pierpont & Tuttle. Said last deed of assignment, in addition to a general assignment of all the property of the firm of Pierpont & Tuttle, ratified the first deed of assignment, and all the doings and proceedings had thereunder by the plaintiff as such assignee. Both of these assignments were objected to, and the objection overruled, and were admitted in evidence. The first deed was objected to upon the ground that one of several partners has no authority, without the consent of the other partners, to make a general assignment of the partnership property. The plaintiff contends that the deed of assignment is *prima facie* good, and it devolved upon the defendant to show that Pierpont did not consent to the assignment, and that unless it was at least shown that he objected to the assignment, the assignment must be held good.

In this we do not agree with the plaintiff. Where an assignment is made by one partner, his right to make that assignment depends upon the consent of his copartner; and to give him authority to make it, he must, in addition, show that his partner consented thereto, or show such a state of facts from which the court could presume assent, or show that the partner was absent from the country, and that therefore his assent could not be procured, or some other state of facts that would show to the court that the partner making the assignment had authority, either by reason of the articles of partnership, or by the fact of his being managing agent of the partnership, or some such fact from which the court could say that the assignment was authorized by the partnership. No such proof was made in this case, and we think, in the absence of such proof, the assignment offered in evidence was absolutely void. See Burrill on Assignments, 5th Ed., Secs. 32-38; *Loeb vs. Pierpont*, 58 Iowa, 469; 43 Am. Rep. 122; *Lowenstein vs. Flaurand*, 82 N. Y. 494; *Haggerty vs. Granger*, 15 How. Pr. 243; *Dunklin vs. Kimball*, 50 Ala. 251; *Sloan vs. Moore*, 37 Pa. St. 217; *Graves vs. Hall*, 32 Tex. 665; Story on Partnerships, Sec. 101; Parsons on Partnerships, 166. This doctrine is now almost universally acknowledged to be the rule.

The second assignment offered in evidence presents a more difficult question. In many of the states the doctrine is held that a surviving partner cannot make a general assignment, and in these states, the theory upon which the decisions were rendered is, that, at the death of one partner, the surviving partner becomes trustee of the partnership estate, and that he has no power to transfer the trust so created to another trustee. This seems to be the doctrine held in New York: *Nelson vs. Sutherland*, 43 N. Y. Sup. Ct. 327; *Loeschigk vs. Hatfield*, 51 N. Y. 660; *Cushman vs. Addison*, 52 Id. 628; also *Ticmann vs. Molliter*, 71 Mo. 512; *Vesper vs. Kramer*, 31 N. J. Eq. 420.

On the other hand, it has been held by some of the states that the surviving partner may make a general assignment of a partnership; and to this effect are numerous decisions, among which is *Emerson vs. Senter*, 118 U. S. 3, in which case the court held that the surviving partner could make a general assignment. The court said: "The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unrea-

sonable delay." This seems to be the settled doctrine of the supreme court of the United States, and should be followed unless there is some statute making a different rule. This assignment was made under the laws of Illinois, and should be interpreted thereunder; but in this case no statute of Illinois was offered disclosing what provisions had been made in that state by statute for the winding up of partnership business; and in the absence of any showing of this kind, we must presume that the statute of Illinois is like that of Kansas. This brings up the question, is there any statute in Kansas that conflicts with the rule laid down by the supreme court of the United States in the last case cited? Article 2, chapter 37, of the compiled laws of 1885, provides for the winding up and settlement of partnership estates. This provides for the appraisement of partnership property, and that the property shall remain in the possession of the surviving partner, and if he sees fit to continue its management, and the disposing of the partnership assets and the payment of the partnership debts, he may do so upon condition that he give a bond for faithful performance of the duties imposed, and the power is given the probate court to cite him, after the giving of such bond, to an accounting, and to adjudicate upon such accounts, as in the case of an ordinary administrator, and for an action upon the bond in case of his failure to faithfully administer the partnership estate; and upon his refusal to give the bond and take charge of the partnership property, it becomes the duty of the administrator of the deceased partner's estate to assume the management of the same and to settle it up. By this statute ample provisions are made for the closing up of a partnership estate, either by the surviving partner, or by the administrator of the deceased partner's estate. We think that the legislature by this provision intended to provide a trustee to close up the partnership upon the death of a member of the firm, and that the statute creates a trust in the surviving partner which he has no power to transfer to another except as it is transferred by his refusal to administer upon the partnership estate, in which event it is transferred by operation of law to the administrator of the deceased partner's estate.

It was said in *Carr vs. Catlin*, 13 Kan. 393, in speaking of this class of administrators: "He is neither more nor less than a special trustee as to this property and this class of debts."

The rule is, that where a form of procedure is provided by statute, and the manner of doing a particular act or thing is pointed out, it precludes the doing of it in any other manner or form. If the surviving partner under our statutes may transfer his trust to an assignee, then the assignee would close up the entire partnership business in the court having jurisdiction of the assignment and estate thereunder, and would be entirely free from the jurisdiction of the probate court, and the statute above cited would be without any force or effect. Did the legislature intend that this statute might be regarded, or not, at the pleasure of the surviving partner? We think not. This means of winding up a partnership business has been prescribed by the legislature, and in the absence of any proof of the statutes of Illinois to the contrary, we must presume that this is the manner of closing up partnership estates in that state. We therefore think the court erred in permitting the second assignment to be given in evidence, as it gave the plaintiff no authority or right to commence the action. * * *

Judgment of the court below reversed and a new trial ordered.

NOTE: For other cases upon the power to make assignments for creditors, see Mechem's Elem. of Partn., § 173.

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## LOWMAN vs. SHEETS.

*Supreme Court of Indiana, 1890.*

124 Ind. 417, 24 N. E. Rep. 351, 7 L. R. A. 784.

Templeton and Sheets made a contract for the establishment of a stock farm and acquired a herd of brood mares for that purpose. Without the knowledge or consent of Sheets, Templeton undertook to sell the entire herd to the plaintiff. Sheets refused to surrender them and Loman brought replevin. Verdict for defendant and plaintiff appeals.

*Wallace, Baird & Chase,* for appellant.

*E. P. Hammond, M. H. Walker, D. Fraser, I. H. Phares* and *W. B. Austin,* for appellee

COFFEY, J. (After stating the facts and disposing of other questions.) It is contended by the appellant that Templeton and appellee were partners, and that, as such, either partner had the right to sell the property owned by the firm and confer a good title, and that by his purchase from Templeton he acquired the title to the whole of the property in controversy and has a right to its possession. We do not deem it necessary to decide whether the contract between the parties was one of partnership or not, as the appellant had no power to sell the entire property, whether it was held as partnership property or otherwise. The partnership, if one existed, was not one in which the parties contemplated a sale of the property here involved, but it was one in which this property was to be kept for the purpose of carrying on a particular business. In such case neither party had the power to sell the entire property: Bates, Partn. § 401; *Hewitt vs. Sturdevant*, 4 B. Mon. (Ky.) 453; *Cayton vs. Hardy*, 27 Mo. 536; *Mussey vs. Holt*, 24 N. H. 248; *Hudson vs. McKenzie*, 1 E. D. Smith, (N Y.)358. Mr. Bates, in his valuable work on partnerships, in treating the subject in the section above cited, says: "But I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of the property held for the purpose of business and to make a profit out of it, and that this only is the true rule." * * *

Affirmed.

NOTE.—See also Mechem's Elem. of Partn., § 186, and cases there cited; *Arnold vs. Brown*, 24 Pick. 89, 35 Am. Dec. 296.

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## CLARKE vs. WALLACE.

*Supreme Court of North Dakota, 1891.*

1 N. Dak. 404, 48 N. W. Rep. 339, 26 Am. St. Rep. 636.

Action by Clarke against Wallace, Winslow, Allen and the administrators of Sheets and Bickford. Judgment for plaintiff, and the defendants, Winslow, Allen *et al.*, appeal. The findings of the court show that in 1883 the defendants Winslow and Allen, together with John A. J. Sheets and Samuel

M. Bickford, the two latter now deceased, and their administrators, being defendants herein, were copartners engaged in the banking, real estate, and loan business at Jamestown, Dak. T., under the firm name of "North Dakota Bank." Allen was the managing member of the firm. The firm had about $1,300 on deposit in the First National Bank of Jamestown. The defendant Robert E. Wallace was president of the latter bank. This bank was in failing circumstances. Wallace needed $5,000 to help him out of the embarrassments connected with the failure of the bank, and he proposed to Allen that, if the North Dakota Bank would aid him in obtaining a loan of that amount, he would secure the deposit of that firm in the said First National Bank. Allen, in his individual name, opened a correspondence with the plaintiff, Clarke, who was a nonresident, which resulted in obtaining a loan from Clarke, to Wallace for the required amount, the note to be guaranteed by the North Dakota Bank. Accordingly Wallace executed the note, and Allen guaranteed it in the name of the North Dakota Bank, and the money was paid over to Wallace. Plaintiff, Clarke, loaned the money largely on the credit of the North Dakota Bank. Wallace secured the deposit of the North Dakota Bank in the First National Bank by delivering collaterals to Allen, and the amount of the deposit was subsequently realized out of the collaterals. Allen had no express authority from the other members of the firm to guaranty the note of Wallace, nor did the other members of the firm have any knowledge of such guaranty, or ever in any manner ratify the same, nor did they, prior to the bringing of this action, have any knowledge that the deposit in the First National Bank was paid from the proceeds of collaterals delivered by Wallace to Allen.

*Nickous & Baldwin*, for appellants.

*Edgar W. Camp*, for respondent.

BARTHOLOMEW, J. (After stating the facts.) This action, so far as these appellants are concerned, is brought on the guaranty heretofore mentioned, the defense being lack of authority on the part of Allen to thus bind the firm. The contract of guaranty was entered into contemporaneously with the execution of the note, and plaintiff parted with his money largely

upon the strength of the guaranty, and the consideration therefor was ample. Baylies, Sur. 54, 55; 9 Amer. & Eng. Enc. Law, 69, and cases cited. The benefit received by the firm in obtaining security on its deposit in the First National Bank becomes material only so far as it bears upon the question of the authority of Allen to bind the firm. It is not usual for persons in business to make themselves answerable for the conduct of other people; and it is settled law that the party who takes a promissory note bearing the indorsement of a firm, either as guarantors or sureties, takes it burdened with the presumption that the firm name was not signed in the usual course of partnership business, and no recovery can be had by simply showing the indorsement. The holder is required to show special authority to make the indorsement on the part of the partner by whom the firm name was signed, or an authority to be implied from the common course of business of the firm or previous course of dealing between the parties, or that the indorsement was subsequently adopted and acted upon by the firm. *Sweetser vs. French*, 2 Cush. 309, 48 Am. Dec. 666; *Schermerhorn vs. Schermerhorn*, 1 Wend. 119; *Bank vs. Bowen*, 7 Wend. 158; *Foot vs. Sabin*, 19 Johns. 154, 10 Am. Dec. 208; *Bank vs. McDonald*, 127 Mass. 82; *Moynahan vs. Hanaford*, 42 Mich. 329, 3 N. W. Rep. 944. In this case there was no previous course of dealing between the parties from which authority on the part of Allen to guarantee in the firm name could be implied; there was no express authority, and no subsequent ratification on the part of the firm, or any member thereof. But it is claimed that the indorsement was made for the purpose of preserving the firm assets or collecting a firm debt, and that the implied powers of a partner cover such a case. We think, however, that plaintiff seeks to push the rule further than any decided case warrants. The case of *Andrews vs. Conger*, 102 U. S. (Co. Op. Ed.) bottom page 90, is cited to support the contention. It does not go so far. In that case one member of a firm, without the consent of his copartners, indorsed in the firm name certain notes issued by a corporation. It appeared, however, that the firm owned a majority of the stock of the corporation, and the larger part of the benefits arising from the notes accrued at once to the firm. The business of the corporation might almost be regarded as a branch of the busi-

ness of the firm. But the correctness of the decision in that case seems to be questioned in Bates on Partnership (volume 1, § 321), and it no doubt goes as far as any court has gone in that direction. In Lindley on Partnership, 341 (bottom paging), it is said: "The latter cases, however, decide that, unless it can be shown that the giving of guaranties is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them." Nor do we think that one partner has any implied power to bind his firm in the use of unusual and extraordinary means for collecting a debt. In this case the guaranty was not necessary to carry on the firm business in the ordinary way. It does not appear but that the deposit of the firm would have been paid in full without the guaranty; but further than that we are not willing to hold that one member of a firm, in order to secure a debt, has implied authority to bind a firm for a distinct and separate liability to a third person; and, particularly must that be true where, as in this case, the liability incurred is several times greater than the debt sought to be secured. It can be readily seen that any different rule would be extremely hazardous. As fully sustaining our views, see *Moore vs. Stevens*, 60 Miss. 809; *Macklin vs. Kerr*, 28 U. C. C. P. 90. Plaintiff failed to establish any liability upon the guaranty in suit as against these appellants, and the judgment of the lower court as to them must be reversed, and a new trial ordered. All concur.

NOTE.—See Mechem's Elem. of Partnership, § 198.

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## JOHNSTON vs. DUTTON.

*Supreme Court of Alabama, 1855.*

27 Ala. 245.

Action by Dutton's administrator against Johnston & Co. The latter firm was composed of Johnston, Fogg and Vanderslice. The notes were drawn and signed, in the firm name, by Fogg. They were dated Dec. 17, 1852, and Jan. 8, 1853. John-

ston denied liability on the ground that prior to the giving of the notes he had given personal notice to Dutton and had also published a notice in the newspaper that he, Johnston, would not be bound by or for any future contracts made by Fogg without Johnston's consent. Other facts appear in the opinion. Judgment for plaintiff and defendant appeal.

*P. Hamilton* and *F. S. Blount*, for appellants.

*R. H. Smith*, contra.

GOLDTHWAITE, J. The evidence in this case tended to show that the appellants and one Vanderslice carried on in copartnership a steam saw-mill, which, by the articles of copartnership, was to continue at least five years; that the note sued on was given with the concurrence of two of the partners, Fogg and Vanderslice, for supplies necessary for the hands engaged in carrying on the mill, which had been ordered by one of them. Upon these facts alone, there can be no doubt that the firm would be bound. The furnishing of supplies to those engaged in the immediate direction of the business was essential to the conducting of it, and within the scope of the purpose for which the individuals had associated; and the authority of either of the partners to purchase such supplies, and give the note of the firm, cannot be questioned.

The principal ground of objection, however, is, that the evidence proved that, before the goods were furnished and the note given, the appellant, Johnston, gave notice to the public that he would not be responsible for any future debt contracted on account of the copartnership, and that this notice was brought home to the party with whom the debt was contracted; and it is insisted that its effect was to revoke the authority of the other partners, so far as he was concerned, to bind the firm from that time.

It is to be observed, that in the present case the contract was concurred in by two members of the firm; and the question, therefore, is, as to the right of the majority to bind the other partners, against their dissent, as to matters appertaining to the common business, and in the absence of any stipulation conferring that power in the articles of copartnership. This question is a new one in this court, and indeed we have found no case in which it has been expressly decided. Both in England

and the United States, there are cases which assert the general proposition, that a partner may protect himself against the consequences of a future contract, by giving notice of his dissent to the party with whom it is about to be made. *Gallway vs. Matthew*, 10 East 264; *Willis vs. Dyson*, 1 Stark. 164; *Vice vs. Fleming*, 1 Y. & Jerv, 227, 230; *Leavitt vs. Peck*, 3 Conn. 125, *post*; *Feigley vs. Sponeberger*, 5 W. & S. 564; *Monroe vs. Connor*, 15 Me. 178, 32 Am. Dec. 148. And where the firm consists of but two persons and there is nothing in the articles to prevent each from having an equal voice in the direction and control of the common business, the correctness of the proposition cannot be questioned. In such case, the duty of each partner would require him not to enter into any contract from which the other in good faith dissented; and if he did, it would be a violation of the obligations which were imposed by the nature of the partnership. It would not, in fact, be the contract of the firm; and the party with whom it was made, having notice, could not enforce it as such. So, if the firm was composed of more than two persons, and one of them dissented, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles or from the nature of the partnership contract. All the cases can be sustained on this principle; and it is in strict analogy with the civil law, which holds where the stipulations of the partnership expressly intrust the direction and control of the business to one of the partners, that the dissent of the other would not avail, if the contract was made in good faith, (Pothier, *Traite du Com. de Soc.*, No. 71, 90); and such also, we think, is the rule of the common law. *Const vs. Harris*, Turn & Russ. 496; Story on Partn. Sec. 121. Were it otherwise it would be denying to parties the right to make their own contracts. If our views as to the governing force of express stipulations are correct, the effect of such terms or conditions as result by clear implication from the articles, or arise out of the nature of the partnership, must be the same. It is as if they had been expressly provided.

Now, whenever a partnership is formed by more than two persons, we think that in the absence of any express provision to the contrary, there is always an implied understanding that the acts of the majority are to prevail over those of the minority, as to all matters within the scope of the common busi-

ness; and such we understand to be the doctrine asserted by Lord ELDON in *Const vs. Harris, supra*, and such was the opinion of Judge Story: Story on Part., sec. 123; 3 Kent's Com. (5 ed.) 45. The rule as thus laid down, is certainly more reasonable and just, than to allow the minority to stop the operations of the concern, against the views of the majority. We do not say that it would be a *bona fide* transaction, so as to bind the firm, if the majority choose wantonly to act without information to or consultation with the minority (Story on Part. sec. 123); but when, as in the present case, the one partner has given notice, and expressed his dissent in advance, there could be no reason or propriety in requiring him to be consulted by the other two.

We do not consider the cases to which we have been referred, holding that one partner has the right at pleasure to dissolve a partnership, although the articles provide that it is to continue for a specified term (*Marquand vs. New York Ins. Co.*, 17 Johns. 525; *Skinner vs. Dayton*, 19 *Id.* 513, 10 Am. Dec. 286), as having any bearing on the case under consideration. Conceding they are law—which is doubtful (Story on Part. sec. 275, n. 3, and cases there cited)—the decision rests solely upon the ground, that the limitation on the right of dissolution is incompatible with the nature of the copartnership contract; and this principle does not militate against the position we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not necessarily produce that result, although it might operate to change the mode of conducting the business. In other words, it might be carried on without contracting debts.

Our conclusion is, that the act, being concurred in by two of the partners, was, under the circumstances, the act of the firm; and that the charge, asserting the proposition that the dissent of one partner against the other two would necessarily exonerate him, was properly refused.

Judgment affirmed.

NOTE: See Mechem's Elem. of Partn., §§ 163, 188.
Compare with cases following.

## LEAVITT vs. PECK.

*Supreme Court of Connecticut, 1819.*

3 Conn. 125, 8 Am. Dec. 157.

Action, against Gad Peck and Egbert D. Peck, as copartners under the firm name of Egbert D. Peck, to recover upon a promissory note made by Egbert to Gad, and by him endorsed to plaintiff. There was evidence that Gad was a dormant partner with Egbert, but Gad denied this and also proved that when plaintiff applied to him to sign the note with Egbert he had refused to do so, but agreed to indorse it and did indorse it, and that plaintiff accepted it. Verdict for defendant and plaintiff appealed.

*N. Smith* and *Twining*, for appellant.

*Staples* and *Denison*, contra.

HOSMER, C. J. It is a well established principle that the contract of a partner is obligatory on his copartner, by virtue of an implied authority which may be rebutted by a refusal to be bound by his acts. By legal consequence, the partner whose authority is thus declined cannot bind the copartnership in favor of those who have knowledge of this fact: *Galway vs. Matthew*, 1 Campb. 403; S. C. 10 East 264; *Willis vs. Dyson*, 1 Stark. 164. Nothing can be more reasonable than that a person may protect himself in this manner against the fraud and misconduct of his associate. The principle under consideration is not founded at all on any supposed waiver by the creditor; but solely and exclusively on the declaration of the person declining to be bound. The implied authority of his partner he has annihilated; and the contract in the name of the firm is of no validity beyond the personal obligation it infers on the individual making it.

Whether a person in any given case has rebutted the implied authority of his partner to bind him, is a question of fact. On this head I am inclined to think the charge to the jury was incorrect. They were directed, if Gad Peck was a dormant partner with Egbert, and refused to give a joint note with

him, to render a verdict for the defendant. The charge involved this principle, that a refusal by Gad Peck to put his name to the note in suit was necessarily a revocation of Egbert's implied authority. This ascribed a consequence to the act of Gad Peck which the premises did not warrant. It is very possible that he might decline affixing his signature to the note, and not refuse to be bound by his acts as a partner. I am aware that there is a difficulty attending the prohibition of Egbert's authority without dissolving the partnership, but I do not consider it as insuperable. If it should appear that Gad Peck did not merely decline to execute a joint note with Egbert, but refused to be bound by his acts, at all events, and this was clearly understood by the plaintiff, I should consider him as within the principle of the cited cases.

The ignorance of the plaintiffs relative to the existence of the copartnership could be of no avail. It is true, they did not know that Gad Peck was partner with Egbert; and of consequence, they could not foresee the manner in which his refusal to become bound as joint promisor would operate. But they would know, and this alone was necessary, that if Egbert were a partner, his authority was disclaimed. The opposite principle involves this proposition: that the plaintiff must have knowledge of the precise consequences to which the refusal would extend. Sufficient is it, if they know the fact, that in every conceivable shape, Gad Peck refused to be bound by the note of Egbert.

New trial to be granted.

NOTE: See Mechem's Elem. of Partn., § 168.

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## WIPPERMAN vs. STACY.

*Supreme Court of Wisconsin, 1891.*

80 Wis. 345, 50 N. W. Rep. 336.

Action for the price of goods sold by Wipperman to Green and Stacy. Recovery below and Stacy appeals.

The defendants, F. F. Green and W. H. Stacy, on the 26th day of October, 1888, entered into an agreement whereby

defendant Green was to put in his time and labor, and the said Stacy was to furnish $20,000 in money or credits, to carry on the business of retail merchandise at the village of Keshena, in this state, and they were to share the profits of said business equally. The said Green was to have the purchasing of all goods that were used in said store, but of parties named by said Stacy. Stacy resided at Clintonville, a considerable distance from Keshena, and Green resided at Keshena with his family. Plaintiff had been in the habit of selling goods to the concern at Keshena on the order of Green, and by the consent of Stacy, up to the 3d day of December, 1888. On that day Stacy served upon the plaintiff the following notice: "Clintonville, Wisconsin, Dec. 3d, 1888. Dear Sir: Don't let F. F. Green have anything to be charged to me unless by an order [upon order] from Clintonville, given by me. [Signed.] W. H. Stacy." About that time Stacy published in a Clintonville paper the following notice: "Notice is hereby given that I, W. H. Stacy, do forbid all and every one from selling F. F. Green, in my name, anything of any kind or nature, for I will not pay for the same, nor hold myself responsible. [Signed.] W. H. Stacy." Of the goods sued for, part were sold and delivered and went into the Keshena store before, and part after, the service of the above notice; and they were used or sold and accounted for in said store; and Stacy knew that at least some of them were so sold and delivered and used or sold in said store after the service of said notice, and without any objection from him. Stacy was often at the store, and knew what business was done, and all the bills for the same were present in the store, open to his observation and inspection.

*Benjamin M. Goldberg (Charles Barber, of* counsel*),* for appellant.

*E. J. Goodrick,* for respondents.

ORTON, J. (After stating the facts.) The referee found, in both cases, that the defendant Stacy, by his acts and conduct, previous and subsequently to said notice, in receiving the plaintiff's goods without hindrance or objection, and selling the same, and applying the proceeds to the use and benefit of the said copartnership, ratified and approved or consented to the doings and acts of his copartner, F. F. Green, in said

matter. This finding appears to have been fully warranted by the evidence. These are the substantial and material facts, and, as a question of fact, we cannot disturb the finding of the referee. The learned counsel of the appellant contends that the firm is not liable for any goods sold to it by the order of Green after the service of that notice. There was no provision in the agreement of copartnership for any such notice to those who are selling goods to the concern, not to sell on Green's order. There is a clause, "that said goods shall be purchased of parties named by said W. H. Stacy." That can have force only as between Stacy and Green. Stacy may name to Green the parties from whom he shall purchase goods for the concern. From the fact that the plaintiff had been selling goods to the firm for a long time by the consent and acquiescence of Stacy, the presumption would be that he was one of the parties named by Stacy. There is no evidence that Stacy had ever notified Green that he should not continue to purchase goods of the plaintiff. It follows that Green had the right to continue to purchase of the plaintiff. If Green had such right, then the plaintiff had the right to sell to him, so far as the agreement is concerned. It is stipulated that Green should have the purchasing of all goods that are used in said store. The only limitation of that right was that Stacy should name the parties from whom purchases might be made by him, and that limitation Stacy has never attempted to enforce upon Green. Green had the right, therefore, to purchase from whom he pleased. If Green had the right to purchase, the plaintiff had the right to sell. What right had Stacy to forbid the plaintiff from selling to Green or any one else? The agreement contains no such provision. This must be the legal construction of the agreement. But the notice is not that the plaintiff shall not sell to the firm of Stacy & Green for their store. But it is: "Don't let F. F. Green have anything to be charged to me, unless by order [or upon order] given by me." The notice provided for in the agreement is personal to Stacy and Green as individuals. "Don't let Green have anything on my account, without my order," is the effect of the notice. The plaintiff had the right to construe and understand this notice according to its language. The plaintiff had no notice from Stacy not to sell goods to the partnership to be charged to the partnership. The notice, therefore, has no effect whatever upon the liability of

the firm, even if Stacy had any right to give it. But if the notice can be construed to mean that the plaintiff shall not sell to the concern to be charged to the concern, which was the only thing he had been doing or offered to do, it is equally nugatory, because not provided for in the agreement.

The only other contention of the learned counsel is that the agreement does not constitute a copartnership between Stacy and Green. It seems to us that it contains every essential element of a partnership. Stacy was to contribute his money, and Green his skill and labor as a merchant, and to conduct the business and make all the purchases, and they were each to have one-half the profits. Although there is no provision that each was to bear one-half of the losses, the equal division of the profits implies that of the losses. *Upham vs. Hewitt*, 42 Wis. 85. As is said in that case, where there was no such express provision, "there was necessarily a communion of profit and loss." *Rosenfield vs. Haight*, 53 Wis. 260, 10 N. W. Rep. 378, 40 Am. Rep. 770, 1 Lindl. Partn. 12. See *Gilbank vs. Stephenson*, 31 Wis. 592, and other cases cited in respondent's brief. But the evidence that Stacy knew that these goods were being sold to the firm, and that they were received into the store, and were being sold out, and tacitly assented to the purchases, and participated in the profits derived therefrom, without dissent or objection, is a ratification of the purchases, and it is now too late for him to shield himself by such a notice, even if it had been given to Green himself with the knowledge of the plaintiff. The liability of the partnership is beyond question.

The judgment of the circuit court is affirmed.

NOTE: See Mechem's Elem. of Partn., § 163.

## DAWSON BLACKMORE & CO. vs. ELROD.

*Court of Appeals of Kentucky, 1899.*

105 Ky. 624, 49 S. W. 465.

Appeal from circuit court, Pulaski county.

Action by Dawson Blackmore & Co. against Walter Elrod & Co. upon an account. Judgment for defendant Walter Elrod, and plaintiff appeals. Affirmed.

*O. H. Waddle*, for appellant.

*James Denton* and *James R. Cook*, for appellee.

WHITE, J. This action was instituted in the Pulaski circuit court by the appellant against appellee and W. F. Hansford, as partners under the style of Walter Elrod & Co., upon an account for goods and merchandise sold to that firm. Hansford made no defense. Appellee, Elrod, admitted the sale and delivery of the goods charged for to Hansford, and that they were used by the firm, but denied liability therefor, for the reason as alleged, that before the goods were sold or delivered by appellant he (appellee) notified appellant that he would not be bound to pay for any purchases made by Hansford on a credit or on time, and that appellee also notified Hansford not to buy any goods except for cash, to be paid for on delivery; that nothwithstanding this notice to both Hansford and appellant, these goods were sold and delivered by appellant to Hansford, who had charge of the business, all of which was done without appellee's knowledge or consent, but against his expressed wishes. To this answer a reply of denial of notice was filed. On this issue the case was tried before a jury, which resulted, after a mistrial and a second jury, in a verdict for appellee. Appellant's reasons and motion having been overruled, this appeal is prosecuted.

On the question of fact the jury might have concluded either way, so close was the testimony; and their finding will not be disturbed, if they were properly instructed. The court gave

one instruction as follows: "If you believe from the evidence that defendant Elrod before the 5th day of April, 1894, gave notice to Adams not to sell Hansford any more goods on credit, you will find for defendant; but unless you so believe from the evidence you will find for plaintiff." It was shown that the sale was made by Adams, agent and stockholder in appellant company. We are of opinion that this instruction embraced the law of this case. The rule of law that one partner can bind all the members of the firm about matters within the scope of the partnership business rests upon agency; the principle being that all the partners have agreed that he should do so. This agreement to be bound by the acts of one within the scope of the business is implied by law from the very nature of the association, and from the customary course of dealing. But a partnership may be dissolved, and then the power to bind all ceases after notice of dissolution. Likewise it seems clear that notice that the authority to bind all did not exist in one partner would relieve from liability the other partner, just as after dissolution he is no longer bound. The partner selling or trading with one partner cannot bind the other partner after notice that he will not be bound. It is notice that the implied agency had ceased. Nor do we think this rule is changed by the fact that the goods came to the firm, and were used by the firm. This might have been the very thing that the appellee did not desire, and the very thing he undertook to guard against; yet if the acts of his partner, against his wishes and over his protest, in receiving the goods and using them, can bind appellee to pay for them, the notice to appellant might as well not have been given. The effect of the notice, if given, must be to put the seller on notice that if you sell over my protest, in no event will I be liable. This view is sustained by *Monroe v. Connor*, 15 Me. 178, 32 Am. Dec. 148. The instruction being in accordance with these views, and the verdict not being against the decided weight of the testimony, the judgment is affirmed.

NOTE.—See Mechem's Elements of Partn., § 163.

# X.

## WHO IS LIABLE FOR THE ACTS OF A PARTNER.

(See also the cases under Subd. IX, *ante*.)

### 1. In Contract.

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### PITKIN vs. BENFER.

*Supreme Court of Kansas, 1892.*

30 Kan. 108, 31 Pac. Rep. 695, 34 Am. St. Rep. 110.

Action by Geo. W. Pitkin & Co. against John Y. Benfer, H C. Settle and L. B. Keith, as copartners doing business under the firm name of John Y. Benfer, to recover for goods sold and delivered. There had been such a firm, but, in pursuance of a notice given in January, it was dissolved on the last day of February, 1888. Benfer gave a written order for the goods on February 9, but stipulated that they should not be shipped until March 1, 1888. Plaintiffs, at the time of the sale, did not know of the partnership, and charged the goods to Benfer. Judgment below was in favor of Settle and Keith, and plaintiff appealed.

*H. C. Solomon*, for plaintiffs.

*Wells & Wells*, for defendants.

Johnston, J. (After stating the facts.) It is insisted by plaintiffs in error that, as Settle and Keith were dormant partners of the firm of John Y. Benfer, they are liable for the goods ordered during the existence of the partnership. It will be observed that, while the goods were ordered during the continuance of the partnership, they were not to be shipped or delivered until the partnership had expired. By agreement of the parties the partnership was to be discontinued on the last day of February, 1888, and Benfer ordered the goods in his own name, to be shipped the day after the dissolution of the partner-

ship occurred. It is true, as contended, that the persons who participate in the profits of a trade or business ostensibly carried on by another are liable for contracts made and credits given during the existence of the partnership. The credit is not presumed to have been given on the sole and separate responsibility of the ostensible partner, but binds all for whom the partner acts, if done in their business and for their benefit, to the same extent as though the partnership had been open and avowed. Here, however, no goods had been furnished, no sale made, nor was any credit given while the partnership existed. Particular attention is called to the case of *Bromley vs. Elliot*, 38 N. H. 287, 75 Am. Dec. 182, as being on all fours with the case at bar. In that case the goods were furnished and the credit given while the dormant partner was a member of the firm. He received the benefits of the transaction, and, according to all the authorities, was equally liable with the ostensible partner. The distinction in this case is that the goods were not received while Settle and Keith were connected with the partnership, nor was it intended by Benfer that they should be shipped and delivered to the firm. Knowing that the partnership would expire with the month of February, Benfer ordered the goods in his own name, and particularly directed that they should not be shipped to him until the 1st of March, after the expiration of the partnership. It was evidently his intention that no sale or shipment would be made to the firm, and that delivery would be purposely deferred until he would have absolute control of the business. No benefits were received by Settle and Keith from the transaction, nor was there any credit given to the firm for these goods while they were members of it. A dormant partner, when discovered, is liable to the same extent as an ostensible partner, but no further; and, if the partnership had been open and avowed in this case, and its duration known, and Benfer had ordered goods in his own name, to be shipped and delivered after the dissolution of the partnership, Settle and Keith would not have been liable for the value of the same. Judge STORY, in speaking of the liability of dormant partners, remarks that "of course, the retiring partner is not, by his retirement, exonerated from the prior debts and liabilities of the firm. In the first place, then, a dormant partner is not liable for any debts or other contracts of the firm, except for those which are con-

tracted during the period that he remains a dormant partner. Upon his retirement, his liability ceases, as it began, *de jure*, only with his accession to the firm. The reason is that no credit is, in fact, in such case, given to the dormant partner. His liability is created by operation of law, independent of his intention, from his mere participation in the profits of the business; and therefore it ceases by operation of law as soon as such participation in the profits ceases, whether notice of his retirement be given or not." Story, Partn. § 159. See, also, Para. Partn. (3d Ed.) p. 451. Here no liability was created until Settle and Keith had retired from the firm. The goods never came into the possession of the firm, nor was it the purpose that they should. They were sold to Benfer, and came into his individual possession as his own property, and he sold them as such. We think the court correctly held that he alone was liable for the price of the same.

The judgment of the district court will be affirmed.

All the justices concurred.

NOTE.—See Mechem's Elem. of Partn., §§ 198, 265.

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## GRIFFITH vs. BUFFUM.

*Supreme Court of Vermont, 1850.*

23 Vt. 181, 54 Am. Dec. 64.

Action by Griffith & Co. against Buffum and Ainsworth as partners, to recover for marble sold to Buffum. Judgment to account was rendered in the county court, and an auditor was appointed to report the facts. Judgment was rendered for the defendants upon the report. The facts appear from the opinion.

*Cook, Harrington & Ross*, for the plaintiffs.

*D. H. Nicholson*, for the defendants.

HALL, J. The question for our decision is, whether, upon the facts reported by the auditor, the defendants are properly chargeable with the marble slabs sold and delivered by the plaintiffs to the defendant Buffum.

There seems to be no doubt that if one partner purchase property upon his single credit, for the use of the partnership concern, and the seller is not aware of the existence of the partnership, he may, when he discovers it, have the benefit of the partnership liability. The ground of making the partnership firm liable is, that the property having been obtained for their joint benefit and to enable them to make a common profit, it is but just that they should be jointly liable to pay for it.

It is doubtless essential to the validity of such a claim by the vendor that the partnership should have been unknown to him at the time of the sale; for if he were aware of the partnership, or ignorant of it through his own fault, he would be presumed to have made his election to give credit to the individual instead of the firm, and having made such election, would be bound by it: 3 Steph. N. P. 2402.

It is not claimed on the part of the defendants that the plaintiffs had any knowledge that they were partners. The existence of such partnership is denied, and the question is, whether the defendants were in fact partners.

It is true, that two or more persons may be made liable to third persons as partners, when, as between themselves, they are really not so. But such liability only arises when third persons have trusted to their credit—have parted with their property upon the faith of the acts or declarations of the supposed partners, indicating that they were such. In this case the plaintiffs were not deceived by any false appearances; they gave no credit to the firm, but trusted Buffum only; and if Ainsworth is to be made liable, it can only be because he was really and truly a partner with Buffum.

In order to constitute a partnership between the parties themselves, it is necesary that they should have a common interest in the profit and loss of the business in which they are engaged.

It is not essential that each should furnish a share of the capital or property which is to become the stock or subject matter of the business of the partners.

One may furnish the capital or stock, and another contribute his labor and skill. And if it be agreed between the parties that one shall furnish on his own account a particular kind of stock to be used in the business, yet if,

when purchased, it becomes the subject of labor and skill, and in its altered state is to be sold for the common benefit, it constitutes a partnership business; and if such particular kind of stock be purchased on his own account by the party who is by the agreement to furnish it, yet the seller, on discovering the partnership, may make the firm chargeable for it. This position is sustained by many authorities referred to in the argument: 3 Kent's Com. 26; *Sylvester vs. Smith*, 9 Mass. 119; *Everitt vs. Chapman*, 6 Conn. 347.

In the present case the parties agreed to work together in the business of manufacturing marble. Buffum was to furnish the marble and Ainsworth to pay him one-half of the cost of it. Buffum was to board Ainsworth, and both were to contribute their labor and skill in the business; and the products and avails of the business were to be equally divided between them. We think the parties became strictly partners as between themselves. Whatever the manufactured articles should sell for, above the cost of the materials and labor bestowed upon them, would be profits, which the parties were to share in common; and if the sale should be for less than such cost, the parties would suffer a loss, which would fall equally on both. The defendants thus having a common interest in the profits and loss of the business, and the marble charged in the plaintiff's account having been used by the defendants in such business, we think they are liable for it as partners.

The judgment of the county court is therefore reversed, and judgment is to be rendered for the plaintiffs for the amount of their account, as reported by the auditor.

NOTE.—See Mechem's Elem. of Partn., § 197.

## CLEVELAND vs. WOODWARD.

*Supreme Court of Vermont, 1843.*

15 Vt. 302, 40 Am. Dec. 682.

Action upon a book account. The opinion sufficiently states the case. Judgment for plaintiff below.

*S. H. & E. F. Hodges*, for the plaintiff.

By Court, WILLIAMS, C. J. This case seems to be conclusively settled by authority. The plaintiff had dealings with the defendant. The only dispute is in relation to the four last items in the plaintiff's account, which were for labor performed on a farm, of which the defendant and Stillman Woodward were owners, and which they carried on in company. The defendant contracted with the plaintiff for the labor, who did not know of the existence of the company until after the commencement of this suit. If these items are disallowed, the balance would be due to the defendant. It is to be remembered that it is only in this action that advantage can be taken of the non-joinder of a joint debtor, on trial of the merits. It is settled that a plaintiff cannot be compelled to be a creditor of two, one of whom he did not know, as his joint debtors, and not be the sole creditor of the one he does know. In the case of *Dubois vs. Ludert*, 5 Taunt. 609, it was decided that if a man enters into a contract with one person, not knowing he has a partner, it is competent for that partner, being sued, to plead, in abatement, that he has other partners who are not joined. That case, however, stands alone, and is opposed to the decision in the case of *Baldney vs. Ritchie*, 1 Stark. N. P. Cas. 338; *Doe vs. Chippenden*, there cited; to the opinion of Lord ELDON in *Ex parte* Norfolk, 19 Ves. 455, and directly overruled by Lord TENTERDEN, in *Mullett vs. Hook*, Moo. & M. 88, and by the court of king's bench, in the case of *De Mautort vs. Saunders*, 1 Barn. & Adol. 398. By these cases it is fully settled that, even in the case of a general partnership, if a contract is made with one of two partners alone, and the plaintiff is not aware that he is dealing with the partnership, and it is not disclosed

to him by the defendant with whom he deals, the non-joinder cannot be pleaded in abatement. *A fortiori*, it cannot be done in the action on book, where a failure to recover might endanger all the security he may have by attachment for his debts.

The judgment of the county court is, therefore, affirmed.

NOTE.—See Mechem's Elem. of Partn., § 197. Compare with preceding case.

## BERKSHIRE WOOLEN CO. vs. JUILLARD.

*New York Court of Appeals, 1879.*

75 N. Y. 535, 31 Am. Rep. 488.

Action in the nature of a creditor's bill.

The material facts are as follows:

In April, 1873, the Riverside Mills and The City Woolen Company owed the firm of Hoyt, Spragues & Co., about $1,000,000 which was secured by the personal guarantee of Josiah Chapin. To reduce this debt Chapin, on the 4th of April 1873, borrowed $600,000 from the five savings banks, giving his individual notes due in one year, and as security, executed to trustees a mortgage on certain real estate. On the same date for further security, a bond was given conditioned to pay so much of the loan as should not be paid by the real estate.

The bond contained the following covenant:

"For which payment well and truly to be made, we bind ourselves and each of us and any six, five, four, three or two of us, our and each of our, and any six, five, four, three or two of our heirs, executors and administrators jointly, severally, and respectively by these presents." This bond was executed by Josiah Chapin as principal and by all the members of the firm of Hoyt, Spragues & Co. individually as sureties.

Albert S. Gallup testified that he negotiated the loan to Chapin; that he was acting for and as a member of the firm of Hoyt, Spragues & Co., and that the loan was negotiated to enable Josiah Chapin to reduce the indebtedness of the Riverside Mills and the City Woolen Company on said company's books.

*Thomas H. Hubbard*, for appellant.

*Charles M. Da Costa*, for respondent.

RAPALLO, J. The bond upon which the banks found their claim against the copartnership assets of the firm of Hoyt, Sprague & Co. is executed by all the six members of that firm, and purports to be their joint obligation, as well as the several obligations of each of them. It also purports to create a joint obligation on the part of any two or more of them. The only aspect in which it is necessary to consider it on this appeal, is as the joint obligation of all the members of the firm, and the question presented is whether it can be enforced as a copartnership obligation against the copartnership assets, notwithstanding that the firm name is not mentioned therein, but it appears on its face to be simply the joint obligation of the copartners, contracted in their individual names, and is under seal.

We are of the opinion that, notwithstanding the form of the instrument, if it was executed in the business of the firm and for its benefit, it should be regarded as a copartnership obligation payable out of the copartnership funds.

In the present case it is quite clear from the proofs that the transaction in which the bond given was for the benefit of the firm of Hoyt, Sprague & Co., and that all but a fraction of the sum advanced by the banks on the credit of the bond was paid over by them to that firm, and applied on account of its claims against the Riverside Mills and the City Woolen Company. The loan from the banks to Chapin was negotiated by Mr. Gallup, one of the firm of Hoyt, Sprague & Co., in behalf of that firm, as he testifies. The two companies last named being indebted to Hoyt, Sprague & Co. in a million of dollars, for which indebtedness Mr. Chapin was surety, Mr. Gallup negotiated the arrangement whereby the banks agreed to loan to Mr. Chapin the sum of $600,000 on his notes for that amount, secured by mortgage on his real estate and the collateral guaranty of the bond in question executed by all the members of the firm of Hoyt, Sprague & Co. All this was done to enable Chapin to reduce the debt for which he was surety to Hoyt, Sprague & Co, and accordingly he gave that firm orders on the several banks for their respective proportions of the loan of $600,000, all of which sums were paid to and receipted for by Hoyt, Sprague & Co. except the first six months' interest in advance, which was retained by the banks, and the sum

of about $55,000 of the principal sum loaned, which Hoyt, Sprague & Co. do not appear to have received. The form of the bond is peculiar, but seems to have been contrived for the purpose of giving to the banks power to enforce it against either the joint or separate estates of the members of the firm of Hoyt, Sprague & Co., or any of them, as might prove most to the interest of the banks. From the nature of the transaction we think it must have been the intention of the parties that the firm should be bound, and that the individual names of all the partners were used for the reason that the instrument was under seal, and that a several as well as joint liability was desired. We can see no objection to a firm binding itself in that form, where the transaction is one for the account of the partnership and all the partners unite in the act; while it would be in the highest degree inequitable to deny to the creditors whose funds have under such circumstances gone into and increased the copartnership assets, the right of resorting to those assets for repayment.

When funds or property are obtained on the obligation of only a portion of the members of a firm, the fact that the property thus obtained goes to the use of the firm is not of itself sufficient to render the firm liable. But where the property is not only obtained for and applied to the benefit of the firm, but is so obtained by the joint act and upon the joint written obligation of all its members, and the credit is given to all, the transaction is in substance a copartnership transaction, though the firm name is not actually used in the writing and though the partners may have superadded to their joint obligation the several liability of each of them. The cases cited on the part of the appellant in support of the proposition that the joint obligation of all the members of a firm is not equivalent to an obligation of the firm do not sustain that proposition, where the transaction is in the business or for the benefit of the firm. In *Forsyth vs. Woods*, 11 Wall. (U. S.) 486, the reasoning is strictly confined to an obligation contracted by the members outside of the partnership business and proceeds wholly on the ground that the firm property should be applied in the first instance to the payment of debts incurred for the benefit of the partnership, as its property presumably consists of what has been obtained from its creditors. In *Turner vs. Jaycox*, 40 N. Y. 470, I do not understand, from the note of

the reporter, anything more than that the majority of the court declined to hold as a general proposition that a note signed by all the members of a firm was the same as one signed by the firm. That nothing more was decided is apparent from the judgment, which sustained the note in that case as a copartnership debt. In *In re Weston*, 12 Metc. (Mass.) 1, the decision is placed upon the ground that the partners had signed as sureties and there was no evidence that it was a partnership transaction. In *Ex parte Stone*, L. R. 8 Chan. App. 914, 917, where the obligation was shown to have been given for money borrowed for partnership purposes, it was allowed to be proved against the partnership estate though signed and sealed by the partners as individuals without naming the firm.

We think it sufficiently appears in this case that the purpose of the transaction was to raise money from the banks, to be paid to the firm of Hoyt, Spragues & Co., for which loans Chapin and his property were to be primarily liable to the banks, and that the bond now in question was given by the members of the firm to induce the banks to make the loan, so that the firm might receive the avails in part payment of the claims for which Chapin was liable to them as surety, and that these circumstances are sufficient to justify the allowance of the claims of the banks against the copartnership.

The orders should be affirmed, with costs out of the fund.

All concur.

Orders affirmed.

See Mechem's Elem. of Partn., § 200.

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## HASTINGS NATIONAL BANK vs. HIBBARD.

*Supreme Court of Michigan, 1882.*

48 Mich. 452, 12 N. W. Rep. 651.

Assumpsit. Plaintiff sued W. and M. Hibbard, Peter Graff and Covode as makers, and Hinsdale and Philip Graff as endorsers of a promissory note for $5,000 made and discounted in December, 1879, and payable April 1, 1880, when it was dishonored. The only question which became material related to the legal identity of the makers, who signed as "Hibbard & Graff."

Upon certain facts there was no dispute. The two Hibbards and Peter Graff for several years did business at Grand Rapids under the name of Hibbard & Graff, and in that name ran two flouring mills, called the Valley City mills and the Crescent mills. The Valley City mill was a rented building and had only been occupied about a year.

On January 27, 1879, Hibbard & Graff formed a partnership with Covode to run the Valley City mill, that firm to own three-fourths and Covode one-fourth interest. The business was to be entirely distinct from the Crescent mill business, in which Covode was to have no interest, although the business so far as practicable was to be done in the Crescent mill office, but the accounts were to be kept separate. Different bookkeepers kept the books, and the Valley City mill office was in a different room from the other. The name of the new firm was to be the same as the old one, Hibbard & Graff.

After the new firm was organized letter heads were printed which at the top contained the names of all four. Beneath these names appeared the name Hibbard & Graff, as proprietors of the two mills. These appear to have been used indiscriminately. The Valley City mill kept no bank account and did no bank business, but borrowed when necessary of the Crescent mill, and was charged for such advances and credited with money and other counter credits furnished by itself to the other. No notes were issued by the Valley City mills in the course of their business, and all moneys received on loan discounts were paid into the Crescent mills where an account was kept of advances made to the Valley City mills as with any other individual debtor.

*Blair, Kingsley & Kleinhans*, for appellant.

*John Patton, Jr.*, and *N. A. Earle* for defendant Covode; *John C. Fitzgerald* for W. Hibbard; and *Simonds, Fletcher & Wolf* for P. M. Graff, M. Hibbard and P. Graff, Jr.

CAMPBELL, J. The note in suit is one of two $5,000 notes executed by Wellington Hibbard while Covode was absent in Europe, under the name of Hibbard & Graff, not for the benefit of the firm, but to use in his and Philip Graff's outside gambling wheat speculations, which seem to have been destroying the means of the business. The money was obtained as claimed by plaintiff under pretense that it was wanted for actually contemplated wheat purchases for milling business. The ques-

tion is, if this was so, which firm was the maker in the eye of the law? The jury found that the new firm was not the maker. The errors assigned relate to the charge of the court, given or refused, on various parts of the case.

The court actually charged that Covode would not be liable merely because he was a partner in the Valley City business, if the loan was negotiated as part of the business of the Crescent mills, but that presumptively a note might be made by a partner which would bind the firm for which he made it, if taken without knowledge in the bank, on reasonable grounds of inquiry, that it was unauthorized. Also that Covode might be bound by allowing himself to be held out as a member of the firm purporting to act, if faith was given in the discount to his being a partner.

It was charged that if credit was given exclusively to the other members of the firm and not to Covode, he would not be bound unless by subsequent ratification, if the money was not negotiated for the business of the Valley City mill. But on the other hand if the bank only knew of a firm which it supposed to be composed of the four, and made the loan on the credit of that firm, then all would be bound if the transaction was in good faith; and further, that although Covode was not a member of the Crescent mills firm, he would be bound if he had allowed himself to be held out as a member of a firm operating both mills, if the bank relied upon that in good faith. The letter heads were held to authorize the jury to draw such an inference if they thought them calculated to create such an impression, and if acted on by the bank as before mentioned. And it was also held that unless the bank had reason to believe to the contrary it could rely on the representations of Mr. Hibbard concerning the purpose of the loan, and if informed it was for the firm of four, credit should be presumed to have been given to the four.

The jury, in answer to specific requests, found that Covode was not known to plaintiff, and that exclusive credit was given to the other persons as a firm. They also found that the note was given by Wellington Hibbard to obtain money to speculate in wheat margins on his own account, and that this was a gambling transaction.

It is assigned as error that these findings are not supported by evidence.

Error is also assigned on the charges bearing on the effect of giving exclusive credit to others than Covode and on his lia-

bility in case he was not actually a partner of the firm relied on. Also to so much of the charge as held that if the money was lent with notice that it was for business beyond the scope of the partnership business and for different parties, the bank might be affected by the fraud without absolute knowledge of it.

Error is also alleged on the refusal of the court to make several charges substantially as follows: First, that when two firms in one city of the same name have some members in common, and a person who is a member of both issues a note which is discounted in good faith without information as to which firm issued it, the holder may elect which firm he will hold. Second, a charge was asked to the same effect as applied specifically to the firms in question and Mr. Covode's liability. Thirdly, that in such case the partners were themselves responsible for the hardship which they might have avoided by using different firm names. Fourth, that writing the letters which were sent in regard to obtaining the discounts, on the letter heads before referred to, was such a holding out of Covode as a partner in both mills as, if relied on in good faith, would render him liable. And fifth, that there was no evidence that the bank officers knew it was for an improper purpose.

The special findings of the jury, if based on testimony, render the fourth and fifth requests just named unimportant. It is distinctly found that credit was not given to Covode as a partner and was given only to the others. It is not claimed, however, and the court below did not hold, that the use of the letter heads in question would not have bound him if credit was actually given in reliance on them as showing one firm for both mills. But we are not satisfied that the jury had not testimony enough to act on, which justified them in the conclusion that the bank officers relied on the formerly existing firm, which had been known for some time, and paid no heed to the names printed in the corners, or to the letter head itself. It is not uncommon for persons dealing with business houses to pay very little attention to their printed letter heads, and if the inference the jury drew from the whole testimony and demeanor of the witnesses before them was, as it seems to have been, that the bank officers acted on other grounds, we have no right to say, as matter of law, that their conclusions are wrong. It was, after all, a question of fact.

The case, so far as we can see, comes down to the question which was the chief one relied on upon the hearing, whether

the fact that Hibbard represented both firms and both had a common name, gave the plaintiff a right to elect which firm to hold responsible, without reference to the credit actually relied on.

The cases referred to in the elementary works cited by counsel for plaintiff do not, in our opinion—whether correctly decided or not—cover just such a case as the present. They hold unquestionably that where money is lent or credit given to a partnership business, unknown as well as known partners will be bound. It is held also in one or more of these cases that where several firms are concerned together in common interests and a member of some of the firms has so acted concerning paper issued by one of the firms in which he was not a partner, as to give reason to believe him a member, those who dealt on that belief might hold him personally. This is all that was actually decided in the Scotch case of *McNair vs. Fleming*, in which the House of Lords partially affirmed the decision of the Court of Sessions, 3 Dow. P. C. 229. This is the case which Mr. Collyer (Partnership, p. 222) says was regarded by Sir Samuel Romilly as deciding that where different partnerships do business under the same firm and make negotiable paper under the same signature the holder may select whichever of them he pleases as his debtor, but cannot select them all. Neither this nor any other well-defined class of cases went—so far as we can judge—outside of the general rule that partnership liability rests on the ground of agency, and that those who have authorized any one to act on their behalf, either actually or impliedly, are bound when he does so act, to those who deal with him as representing them or the firm to which they belong. It must always be remembered that general language in legal discussions is to be construed with its surroundings, and cannot be dealt with in the abstract.

In the case of *McNair vs. Fleming*, after sustaining the general view of the Court of Sessions, the House of Lords allowed the defendant to set up the defense that plaintiff was barred by sequestration proceedings against the partnership in whose name the paper was issued, of which he was not actually a member, although they supposed him to be. The case of *Yorkshire Banking Co. vs. Beatson*, 4 C. P. Div. 204; s. c. on appeal, 5 C. P. Div. 109, refers to several of the familiar cases on the subject, and like most of them regards the facts of each case as material in fixing the liability.

In the present case there can be no doubt that as between himself and his partners Hibbard had no right to borrow this money for his own purposes. If not absolutely determined by the evidence it certainly tends to show that under their usual course of business even the main firm of Hibbard & Graff could not properly bind Covode by any such loan for firm purposes. As between the two firms the usual practice seems to have confined loans to the original firm. In any event the latter firm if bound at all could only be bound on the principle that it is incident to such business that one partner may bind it. And it is equally clear in our judgment that the firm to be bound must be the firm in whose name and for whose benefit Hibbard was understood to be acting. The court below charged very clearly that if the bank officers supposed there was but one firm of all the four doing business, all would be bound.

But as a matter of fact the original firm of Hibbard & Graff had never changed, and continued on the same relations as before. It had only made an arrangement for two years, subject to termination on ninety days' notice, whereby it allowed the use of one of its mills to a firm in which it held a three-fourths interest, as a partnership, and not in the several names of its members. The case does not therefore differ materially from that of an individual making a partnership arrangement for a separate part of his business, where it has always been held that it must depend on the facts of the case whether paper signed in the individual name was sole or firm paper.

If therefore the bank dealt with the firm it had always known and which was still doing business, and lent money supposing it to be for that firm, the new firm could not be made liable unless the money was actually borrowed or used for its benefit. But this is not pretended, unless on the theory that credit was given to all four, which is clearly negatived.

When this case was here before—although not then in perfect shape for disposal—it was intimated that the result now arrived at appeared to be the proper one. If the jury were right on the facts, we think the court was right on the law. There was evidence from which a different conclusion might have been reached, but the verdict has been allowed to stand, and we must assume justly.

We discover no error in the record, and the judgment must be affirmed with costs.

NOTE: See Mechem's Elem. of Partn., § 202.

## 2. FOR TORTS.

### ENGLAR vs. OFFUTT.

*Court of Appeals of Maryland, 1889.*

70 Md. 78, 16 Atl. Rep. 497, 14 Am. St. Rep. 333.

On the 21st of May, 1883, John P. Shriner, who was engaged in business in Baltimore, was appointed guardian of Mary and John Englar, infants, and as such guardian received of their estate the sum of $10,846.25. He deposited this sum in his own account and used more or less of it in his business. On December 31, 1885, he took his brother, Edward C. Shriner, into partnership with him in the business. On November 15, 1886, the firm was insolvent and made an assignment for the benefit of creditors. The partnership assets amounted to but $9,500. The wards, Mary and John Englar, sought to impress this fund with the trust in their behalf and in priority to the firm creditors upon the ground that their money, in the hands of John P. Shriner as guardian, had gone into the stock of the firm, and that the firm had received the money knowing that it was trust money and was so used in violation of the trust. Edward C. Shriner denied any knowledge that the trust funds had gone into the business. The claim of the wards was denied and they appealed.

*F. C. Slingluff* and *Robert Biggs*, for appellants.

*John P. Poe*, for appellee.

ALVEY, C. J. (After discussing the principle upon which trust funds may be traced.) But suppose at the time of the partnership formed between John P. Shriner and Edward C. Shriner that some portion of the trust fund remained invested in the stock of goods then on hand, or was otherwise employed in the business; in such case the question whether the appellants can be entitled to occupy the position of creditors of the firm, so as to share in the distribution of its assets, and to hold Edward C. Shriner liable, depends upon the fact whether Edward C. Shriner had

notice of and acquiesced in the breach of trust by John P. Shriner, the guardian; for the principle of law is very clear that if a partner, being a trustee or fiduciary, improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, this fact alone, and without anything more, is not sufficient to entitle the *cestui que trust* to occupy the position of creditor, and to enforce repayment of his money as against the firm. To render the firm liable in such case the firm itself must be shown to have been implicated in the breach of trust, and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. But if the other partners have knowledge of such misuse of trust money, and know that such money is being employed in the partnership business for common benefit, they will all be bound for the money so employed, and be made answerable for the breach of trust committed by their copartner with their acquiescence. *Ex parte Heaton*, Buck, 386; *Ex parte Apsey*, 3 Brown, Ch. 266; *Smith vs. Jameson*, 5 Term R. 601; *Ex parte Watson*, 2 Ves. & B. 415; Story, Partn. § 368; 1 Lindl. Partn. (5th Ed.) 161. Here, however, the proof would seem to establish the fact of the entire absence of knowledge on the part of Edward C. Shriner of the use of trust money by John J. Shriner in the partnership business; and in this class of cases it is clearly established by the authorities that the knowledge of the partner committing the breach of trust does not affect the other members of the firm. 1 Lindl. Partn. 161. Edward C. Shriner swears that he had no such knowledge, and he is fully supported in his testimony as to this fact by the testimony of his brother, who swears that no part of the trust fund was used in the business after the formation of the partnership. It is true, Mr. Englar testifies to a declaration or admission made by Edward C. Shriner to the effect that he knew that the trust money was used in the partnership business; but we think there must be some mistake or misunderstanding in regard to the matter, as Edward C. Shriner is emphatic in denying that he ever made such declaration, and he is strongly corroborated in this by the testimony of his brother, and the circumstances of the case. Upon the whole, we are of opinion that the court below committed no error in overruling the

appellants' exceptions to the auditor's account and distribution, and in dismissing the petition, and the order appealed from will therefore be affirmed.

NOTE.—See Mechem's Elem. of Partn., § 206.

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## HESS vs. LOWREY.

*Supreme Court of Indiana, 1890.*

123 Ind. 235, 23 N. E. Rep. 156, 17 Am. St. Rep. 355.

Action for damages for malpractice, brought by Isaac Lowrey against Luther W. Hess and Frank C. Hess. There was judgment for plaintiff, and defendant appealed.

*Mellett & Bundy* and *Brown & Brown*, for appellant.

*T. B. Redding, Chambers & Hedges* and *Charles Roehl*, for appellee.

MITCHELL, C. J. This action was originally instituted by Isaac Lowrey against Luther W. and Frank C. Hess, to recover damages for an injury sustained to the person of the plaintiff, alleged to have been caused by the negligent and unskillful manner in which the defendants, who were partners engaged in the practice of medicine and surgery, reset and treated the plaintiff's shoulder, which had been dislocated. Pending the action, Luther W. Hess died, and the case proceeded to judgment against his personal representative and surviving partner jointly. On appeal to this court, the judgment was reversed. *Boor vs. Lowrey*, 103 Ind. 468, 3 N. E. Rep. 151, 53 Amer. Rep. 519, and note. On the former appeal we arrived at the conclusion that, even though the action was in form *ex contractu*, since the principal or only damages sought to be recovered grew out of an injury to the person, the action would not survive against the personal representative of a deceased partner. *Hegerich vs. Keddie*, 99 N. Y. 258, 1 N. E. Rep. 787, 52 Am. Rep. 25; *Ott vs. Kaufman*, 68 Md. 56, 11 Atl. Rep. 580. The nature of the damage sued for, and not the nature of its

cause, determines whether or not the action survives. *Cutter vs. Hamlen*, 147 Mass. 471, 18 N. E. Rep. 397; 1 Chit. Pl. 101.

The case is here on a second appeal, and the question is now presented whether or not, the action having been abated against the estate of the deceased partner, it can be prosecuted to judgment against the survivor. That each partner is the agent of the firm while engaged in the prosecution of the partnership business, and that the firm is liable for the torts of each, if committed within the scope of his agency, appears to be well settled. *Champlin vs. Laytin*, 18 Wend. 407, 31 Am. Dec. 382; *Tucker vs. Cole*, 54 Wis. 539, 11 N. W. Rep. 703; *Fletcher vs. Ingram*, 46 Wis. 191; *Taylor vs. Jones*, 42 N. H. 25; *Schwabacker vs. Riddle*, 84 Ill. 517; Story, Partn. §§ 167-166; 1 Bates, Partn. § 461. "It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership." 1 Lindl. Partn. 299. Thus, in *Hyrne vs. Erwin*, 23 S. C. 226, 55 Am. Rep. 15, which was an action against two physicians for an injury resulting from the negligent and unskillful setting of a broken arm, it was held that the act of one within the scope of the partnership business was the act of each and all, as fully as if each was present, participating in all that was done, and that each partner guaranties that the one in charge shall display reasonable care, diligence, and skill, and that the failure of one is the failure of all. It is contended, however, that if the appellant was liable at all, he was only liable jointly with his deceased partner, and that, the action having abated as to the deceased partner, the case falls within the rule that, where one or more of the joint plaintiffs or joint defendants dies, the action shall not thereby be abated, if the cause of action survives, but if the cause of action is one that does not survive, then the death of either joint plaintiff or joint defendant abates the whole action. *Meek vs. Ruffner*, 2 Blackf. 23; *Williams vs. Kent*, 15 Wend. 360. The general rule established by the cases is that, where several persons jointly commit a tort for which an action in form *ex delicto* may be maintained, without reference to any contract relation between the parties, the plaintiff has his election to sue all or any

one of those engaged in the wrongful act, even though the existence of a contract may have been the occasion, or furnished the opportunity, to commit the act complained of. But where the action is founded on a joint contract, and is in substance, whatever its form may be, to recover damages for a breach of the contract upon which the action is predicated, all those jointly liable must be sued, in case all are alive, and within the jurisdiction of the court. *Low vs. Mumford*, 14 Johns. 426, 7 Am. Dec. 469; *Weall vs. King*, 12 East. 452; *Whittaker vs. Collins*, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. Rep. 632; 1 Lindl. Partn. 482; Bish. Non-Contract Law, § 521; Chit. Pl. 469. In a case like the present, where the *gravamen* of the action is the breach of a contract, by the terms of which two persons undertook, as partners, to reset the plaintiff's shoulder, and to treat him with the skill and diligence ordinarily displayed by competent surgeons, and the action is not maintainable without referring to the contract, it may well be, even though the action be laid in tort, that the non-joinder of one of them would be ground for a plea in abatement. Colly. Partn. § 732; Dicey, Parties, 455. But a plea in abatement for non-joinder of parties must, in order to be good, show that the person alleged to be jointly liable and not sued is living, and subject to the process of the court. *Dillon vs. Bank*, 6 Blackf. 5; *Wilson vs. State*, Id. 212; *Bragg vs. Wetzel*, 5 Blackf. 95; *Levi vs. Haverstick*, 51 Ind. 236; *Ferguson vs. Hagans*, 90 Ind. 38; Colly. Partn. § 741; *Merriman vs. Barker*, 121 Ind. 74, 22 N. E. Rep. 992.

If, in an action against partners to recover damages for a personal injury growing out of the breach of a contract, it is necessary, as in ordinary actions *ex contractu*, to join all the partners, it must follow that upon the death of one, notwithstanding the action may abate as to the deceased partner, the rule applicable to ordinary actions upon contracts against partners must obtain. At the common law, the contract of partners was always treated as a joint agreement, but the firm creditors could not proceed against the estate of a deceased partner, because the death of one of the partners extinguished the contract as to him, leaving it in force as the separate engagement of the survivior. The legal remedy of the creditor was thereafter confined exclusively to the surviving partner, except as the common law was modified by statutes, or

by the principles of equity. *Sherman vs. Kreul*, 42 Wis. 33. The right to sue for claims due the firm, as well as the liability to be sued for claims against the firm, devolves exclusively upon the surviving partner. *Meek vs. Ruffner, supra; McLain vs. Carson's Ex'r*, 4 Ark. 164, 37 Am. Dec. 777; *Childs vs. Hyde*, 10 Iowa 294, 77 Am. Dec. 113; *Emanuel vs. Bird*, 19 Ala. 596, 54 Am. Dec. 200; 2 Lindl. Partn. 665. Upon the death of one partner, the creditor has a right to collect his claim at law from the survivor, or, if the cause of action survives against the personal representative, to proceed, in the manner pointed out by the statute, against the estate of the deceased partner. *Ralston vs. Moore*, 105 Ind. 243, 4 N. E. Rep. 673; *Kimball vs. Whitney*, 15 Ind. 280; *Gere vs. Clarke*, 6 Hill, 350. If a partner dies pending an action against the firm, the death being suggested on the record, the action does not abate, but may proceed to judgment against the surviving partner unless the cause of action dies, not only as against the personal representative of the deceased partner, but as against the surviving partner also. Colly. Partn. § 727; Pom. Rem. §§ 250, 251; Bates, Partn. § 1055; *Williams vs. Kent, supra.* When the damages sued for arise out of an injury to the person of the plaintiff, the cause of action dies with the person of either party; but the cause of action dies only so far as it affects the liability of the decedent, or his personal representative. Neither by the common law, nor under the statute, does the cause of action die as to a surviving partner or defendant, who, as we have seen, remains liable for all claims against the firm. *King vs. Bell*, 13 Neb. 409, 14 N. W. Rep. 141; 8 Wait. Act. & Def. 502. While the members of the firm were all alive, each was liable *in solido* as principal, the firm being in law a single entity. Upon the death of one partner, his liability was extinguished, but the surviving partner, as the sole representative of the firm, continued liable. *Shale vs. Schantz*, 35 Hun, 622. It is only where the cause of action does not survive in favor of, or against either of, the joint plaintiffs or defendants that the death of one abates the whole action. If the action is, as doubtless it should be, regarded as a suit *quasi ex contractu* for damages, for an injury to the person occasioned by the breach of a joint contract, the death of one of the defendants simply severed the joint liability and extinguished the claim against the decedent, while it continued in full force as to the sur-

vivor. If the action is regarded as purely in tort, as where the injury is willful and intentional, then the liability of the defendants may be joint and several, and the death of one does not abate the action as to the other. Colly. Partn. (6th Ed.) 1079, note. The death of one partner in no wise affects the liability of the survivor, who, upon the happening of that event, becomes individually liable to make good the joint undertaking of both. Ordinarily, in actions *ex delicto*, where the liability arises from the misconduct or wrongful act of the parties, each is liable for all the consequences, and there is no right to enforce contribution; but this rule does not apply between partners, unless the liability resulted from a meditated or willful wrong, intentionally inflicted by the one seeking to enforce contribution. *Armstrong Co. vs. Clarion Co.*, 66 Pa. St. 218, 5 Am. Rep. 368; *Pearson vs. Skelton*, 1 Mees. & W. 504; *Jacobs vs. Pollard*, 10 Cush. 287, 57 Am. Dec. 105; *Acheson vs. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663; *Bailey vs. Bussing*, 28 Conn. 455; 4 Amer. & Eng. Cyclop. Law, 12, 13; Lindl. Partn. 771.

That the cause of action died as to Luther W. Hess does not at all affect the question of the right of contribution between the survivor and his personal representative. The right of contribution grows out of the partnership relation, and rests upon the implied obligation of each partner to contribute in proportion to the liquidation of all partnership liabilities, unless the liability arose out of an intentional tort, committed by the partner asking contribution. That the right of contribution exists, affords a persuasive reason for holding that the action may be maintained against the surviving partner.

From every point of view the conclusion follows that the cause of action did not die as to both partners because one member of the firm died, and that the proceeding to judgment against the survivor was not of itself erroneous.

(Omitting questions of practice.)

Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 204, and cases cited.

## ROSENKRANS vs. BARKER.

*Supreme Court of Illinois, 1885.*

115 Ill. 331, 3 N. E. Rep. 93, 56 Am. Rep. 162.

This was an action brought by A. E. Barker in the superior court of Cook county against O. L. Rosenkrans and J. H. Weber, to recover damages for an alleged malicious prosecution and false imprisonment. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff for $2,000. The defendants appealed to the appellate court, where the judgment was affirmed, and they now appeal to the supreme court. The facts out of which this litigation grew, so far as is necessary to state them, are substantially as follows: In 1882 Barker resided in Iowa, and was engaged in a small way in the jewelry business. In the latter part of the year he bought a bill of goods of Rosenkrans & Weber, of Chicago, amounting to $350. The goods were sold by a traveling man named Johnson. When the bill became due $100 was paid, but no part of the balance has ever been paid. Rosenkrans resided in Wisconsin and did business in Milwaukee, but at the same time he was a partner in the jewelry business of Rosenkrans & Weber, in Chicago, the firm being composed of Rosenkrans and Lucy B. Weber, who was the wife of J. H. Weber. J. H. Weber had the general management of the business of this Chicago firm. On or about the first of February, 1883, the bill of goods remaining unpaid, Johnson, who had sold the goods, induced Barker to visit Chicago under the pretense that he would enter into partnership with him in the jewelry business in Chicago. Upon the arrival of Barker, Weber was notified by Johnson of the arrival, and on the fifth day of February, 1883, Weber filed a petition and obtained an order for a writ of *ne exeat*. The writ was issued and placed in the hands of the sheriff, who arrested Barker and held him in custody ten or twelve hours, when he was released on bail. Subsequently, and on the 17th day of March, 1883,

on demurrer, the petition was dismissed. It does not appear that Rosenkrans had any knowledge that the proceedings had been instituted against Barker until about the 1st day of April, 1883, and at this time a petition for a *ne exeat* had been held bad on demurrer and dismissed, and Weber had then or a few days thereafter appealed to the appellate court. When Rosenkrans learned what had been done he notified Weber that it was wrong, and advised the dismissal of the appeal from the appellate court, and under his advice no further steps were taken to prosecute the appeal.

*Rosenthal & Pence*, for Omar L. Rosenkrans.

*Shuman & Defrees*, for J. Hawley Weber.

*Abbott, Oliver & Shoubalter*, for appellee.

CRAIG, J. (After stating the facts.) At the request of the plaintiff the court instructed the jury: "If Rosenkrans became acquainted with the facts in the matter about the last of March, 1883; that, being so informed as to said facts attending the commencement of said proceedings, said Rosenkrans suffered said proceedings to be continued in the courts through the medium of an appeal, and did not in any way discountenance said proceedings, or put a stop to the same,—then the court instructs the jury that if they find from the evidence that said *ne exeat* proceedings were instituted maliciously and without probable cause, and said Rosenkrans was so informed, but allowed the *ne exeat* case to proceed, then all such facts, if the jury so believe, may be taken into consideration in determining whether said Rosenkrans ratified and approved of the arrest of said Barker; and if he did so approve and ratify the arrest of said Barker, then he would be equally liable with Weber, if said arrest was made maliciously and without probable cause." The court also instructed the jury that if they found the defendants guilty under the evidence, that the arrest was malicious and without probable cause, and that plaintiff has sustained actual damages, then, on assessing damages, they are not limited to compensation for actual damages sustained, but may give exemplary or vindictive damages.

These instructions are claimed to be erroneous as to the defendant Rosenkrans. An instruction which is not based on

the evidence in the case is improper, and should not be given; it is liable to mislead the jury, and usually results in a wrong verdict. As to the first instruction *supra*, we find no evidence in the record upon which it could fairly be predicated. Rosenkrans testified, and in this he is corroborated by other evidence, that when he came to Chicago and learned for the first time of the proceedings, he notified Weber, who was in charge of the matter, that it was wrong, and the appeal ought to be dismissed. Here he not only failed to sanction and approve, but condemned, what had been done, and under his direction no further steps were taken to prosecute the appeal. The conduct and acts of Rosenkrans contain no element of approval, and the instruction based upon the theory of an approval, in the absence of any evidence to sustain such theory, could do no less than mislead the jury. As respects the other instruction, we are of opinion as to Rosenkrans it is erroneous. It is not claimed that he ordered, advised, or directed the arrest, or that he even knew of the occurrence until after the proceeding in the *ne exeat* case had been dismissed. The claim is that after knowledge of the arrest he approved what had been done. If such was the case, he would only be liable for the real injury sustained, and not for vindictive damages, as held in *Grund vs. Van Vleck*, 69 Ill. 478. But under the instruction the jury were directed that each defendant was liable for actual and vindictive damages.

It is, however, claimed by appellee that Rosenkrans is liable upon either one of two grounds: *First*, because those who caused the arrest were servants or agents of Rosenkrans, acting within the scope of their agency; *second*, the wrongful proceeding was instituted for Rosenkrans, and in his name, and when he became aware of what had been done he ratified it. Weber, who caused the arrest of Barker, was not in fact a partner of Rosenkrans, but he acted for his wife, who was the partner, and, so far as the acts are concerned, they may be regarded as the acts of Rosenkrans' partner. In many respects one partner is the agent of the other. In the purchase and sale of goods within the scope of the partnership business the acts of one may be regarded as the acts of both. In such cases the one that transacts the business acts for himself and in the capacity as agent of the other, and in that capacity he

binds himself and also binds his partner. By entering into partnership each party reposes confidence in the other, and constitutes him his general agent as to all partnership concerns. Gow, Partn. 52. But the question involved here is not as to the liability of one partner for the contracts of the other, but it is whether one partner may be liable in damages for the wrongs of the other. Mr. Collyer, in his work on Partnership, § 457, says: "A learned writer observes that though partners are in general bound by the contracts, they are not answerable for the wrongs, of each other. In general, acts or omissions in the course of the partnership trade, or business, in violation of law, will only implicate those who are guilty of them." And, in 1 Lindl. Partn. bk. 2, c. 1, § 4, the author says: "As a rule, however, the *willful* tort of one partner is not imputable to the firm. For example, if one partner *maliciously* prosecutes a person for stealing partnership property, the firm is not answerable unless all the members are in fact privy *to the malicious prosecution.*"

In *Gilbert vs. Emmons*, 42 Ill. 143, where a question arose as to the liability of one partner for the act of the other in causing the arrest of a person charged with larceny of money belonging to the firm, it was held that the mere knowledge and consent of one partner that the other should have the person accused arrested would not render the partner so knowing and consenting liable to an action for malicious prosecution; it was necessary that the consent should be of such a character as to amount to advice and co-operation. In *Grund vs. Van Vleck*, 69 Ill. 478, a question arose as to the liability of one partner for the tort of the other, and it was held that one partner cannot involve another in a trespass unless in the ordinary course of their business, and in a case where the trespass is in the nature of a taking which is available to the partnership; and in such case, to render the partner liable who did not join in the commission of the trespass, he must afterwards have concurred and received the benefit of it. Here no part of the debt was collected by the commencement or prosecution of the proceedings against Barker, and it is not claimed that a liability exists on account of receiving any benefit from the arrest; and if Rosenkrans is to be held liable, it is upon the ground that he was a member of the firm which instituted the suit and

caused the arrest. This, under the authorities cited, cannot be done. As to the second ground relied upon by appellee,—ratification,—what was said in passing upon the instructions given for appellee is sufficient to dispose of that matter, and no further discussion of the subject is deemed necessary.

(Omitting questions of practice.)

Reversed.

NOTE.—See Mechem's Elem. of Partn., §§ 204 and 205, and notes.

The soundness of the rule laid down in Collyer on Partnership and quoted in Rosenkrans v. Barker, that the firm is not liable for the wrongful acts of a partner, is, at least, open to question.

See also *Chester vs. Dickerson, ante.*

## LIMPUS vs. LONDON GENERAL OMNIBUS CO.

*Exchequer Chamber, 1862.*

1 Hurlstone & Coltman, 526.

**The facts sufficiently appear in the dissenting opinion of**

WIGHTMAN, J. It appears by the evidence in this case that the defendants were the proprieters of an omnibus plying between the Bank and Hounslow, which at the time in question was driven by a coachman in their service; that whilst upon the road, in the course of his employment to drive defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, wrongfully endeavored to hinder and obstruct the passage along the road of another omnibus belonging to the plaintiff; and for that purpose, he, who was ahead of the plaintiff's omnibus 80 or 100 yards, slackened his pace, until the plaintiff's omnibus came up to him and was about to pass, and he then purposely pulled across the road in order to prevent and obstruct his progress, and in so doing ran against one of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reason assigned by the defendants' coachman for this wrongful proceeding was that he pulled across the plaintiff's coachman to keep him from passing, in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman).

It seems clear upon the evidence that this was wholly a wilful and unjustifiable act on the part of the defendant's coachman, and not in the lawful prosecution of his master's business.

A master is undoubtedly responsible for any damage occasioned by the negligence or carelessness of his servant whilst employed upon his master's business. In the present case it was no part of his employment to obstruct or hinder the passing of other omnibuses or carriages; on the contrary he was directed not to do so.

The case appears to me to fall within the principle of the decision in the case of *Croft v. Alison*, 4 B. & Ald. 590 (E. C. L. R. vol. 6), cited upon the argument. In that case the

Court said that the distinction was this: "That if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horse of another person and thereby produces an accident, the master is not liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

In the case of *Lyons vs Martin*, 8 A. & E. 515 (E. C. L. R. vol. 35), Mr. Justice Patteson, in his judgment, says, "*Brucker vs. Fromont*, 6 T. R. 659, and other cases where the master has been held liable for the consequences of a lawful act done negligently by his servant, do not apply. Here the act was utterly unlawful. A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one." There are other cases, some of which were cited upon the argument, to the same effect. In the present case the defendants' coachman wilfully did an illegal act contrary to his masters' orders, and quite beyond the scope of his employment. In this view of the case, it appears to me that if the evidence of the defendants' coachman was believed, as well as that of the other witnesses in the case, the verdict ought to have been for the defendants. The question however before us is whether the direction of the learned judge to the jury, as it appears upon the bill of exceptions, was right in point of law upon the case as it appeared in evidence. I entertain the highest and most sincere respect for the opinion of my brother Martin, but it does appear to me that the mode in which the questions were put to the jury was such as might mislead them, and induce them to find a verdict which I cannot but think was wrong.

He appears to have told them "that if the act of the defendants' driver in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him *in the course of his service*, and to do that which he thought best to suit the interests of his employers and to interfere with the trade and business of the other omnibus, the defendants were responsible; and that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the coachman not to obstruct an-

other omnibus or hinder or annoy the driver in his business were immaterial."

It certainly appears to me that the wilfully or wrongfully attempting to obstruct the progress of another omnibus contrary to the express directions of the defendants, though done by their coachman *whilst* employed in the service of the defendants, cannot be considered an act done by him *in the course of his service.* It was quite beside the course of his service and what he was employed to do; and I cannot consider the express prohibition to the coachman to do what he did as immaterial in considering what was the course of his service in that respect. This was not a case of reckless or careless driving, but of wilfully and wrongfully attempting to obstruct t e passage of another omnibus, and in so doing running against one of the horses. This cannot, I think, under the circumstances be considered as an act done in the course of his service, even though the coachman might think that it was for his masters' interest by such wrongful means to obstruct the business of the other omnibus. The defendants' coachman was not employed to obstruct or hinder the plaintiff's omnibus, nor was it in the course of his service, in the proper sense, to do so. Upon the evidence it was entirely his own wrongful and wilful act, for which I think, according to the distinction taken in the case to which I have referred, the defendants are not responsible. The jury, upon the direction to which I have referred, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and that he thought it for their benefit to obstruct the other omnibus, the defendants would be liable. This I think was wrong for the reasons I have given; and I am therefore of opinion that there should be a trial *de novo.*

WILLIAMS, CROMPTON, BYLES and BLACKBURN, JJ., concur with WILLES, J., that instructions given by Martin, B., was correct.

Judgment for plaintiff affirmed.

NOTE.—See Mechem's Elements of Partn., § 304.

## STRANG vs. BRADNER, *et al.*

*U. S. Supreme Court, 1884.*

114 U. S. 555.

This action was commenced by defendants in error as plaintiffs in a court of the State of New York, to recover of the plaintiffs in error a sum which they alleged they had been compelled to pay, through false and fraudulent representations of one of the members of a partnership, consisting of the defendants, made in the course of partnership business. The defendants set up a discharge in bankruptcy. Judgment for the plaintiffs, which was affirmed by the Supreme Court, and the judgment of that court affirmed by the Court of Appeals.

*Mr. George H. Forster* for plaintiffs in error.

*Mr. William F. Coggswell* for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The evidence before the jury tended to establish the following facts: That for some years prior to June, 1875, the plaintiffs were doing business in the city of Rochester, New York, as partners, under the style of Lowrey & Bradner, while, during the same period, the defendants were engaged in business in the City of New York, under the style of Strang & Holland Bros.; that the special business of plaintiffs was the purchase of wool, which they forwarded to the defendants, as commission merchants, to sell on account; that plaintiffs, for the accommodation of defendants, often furnished them with promissory notes, for the purpose of enabling them to carry on business; that the defendants took care of these notes, paying the same at maturity out of the proceeds of the property consigned, and with money remitted by the plaintiffs; that in the transactions between the parties the plaintiffs were credited with those notes, with the proceeds of property sold on their account, and with money remitted by them, and were charged with the amounts paid to take up the notes; that on or about March 1, 1875, the defendants requested the plaintiffs to furnish them with four

promissory notes, for about $4,000 each, to enable them to raise money thereon, and to be credited to plaintiffs on their account, in accordance with the course of business existing between the parties—such notes to be of odd amounts and made as of different dates before the time they were transmitted to the defendants, so that they might appear to be given for real indebtedness; that, pursuant to that request, the plaintiffs made and transmitted to defendants their four promissory notes, for $4,325.50, $4,326.25, $4,327.13 and $4,327.15, each at four months, dated, respectively, on the 1st, 9th, 15th and 20th days of February, 1875, and each payable to the plaintiffs at the office of the defendants, in the City of New York, and indorsed by the plaintiffs; and that, on or about April 4, 1875, Strang represented to plaintiffs that his firm had not used, nor been able to use those notes, because they were made payable at their office, and requested plaintiffs to lend them four other notes of the same amount, payable at the Metropolitan National Bank, in New York City, to be used in the place of those dated in February.

There was also evidence tending to prove that the plaintiffs, relying upon the representation that the February notes had not been used, and that the defendants desired other notes to be used in their place, executed and delivered to the latter four other promissory notes, each at 4 months, for $4,850, $4951.25, $4,860.30 and $4,970, respectively, dated 13th, 14th, 16th and 20th of March, 1875, payable four months after date to their own order at the Metropolitan National Bank, New York, and by them indorsed; that at the time defendants requested to be furnished with the notes last described they had in fact discounted and put in circulation the February notes, whereby the plaintiffs, as makers and indorsers, were compelled to pay the same to the holders; that when Strang applied for the March notes the defendants knew that they were insolvent, but that fact was not known to plaintiffs; that he made such representations and procured said notes with the intent to defraud the plaintiffs; and that the latter was compelled to pay such part of the March notes as amounted, principal and interest, to the sum for which they obtained judgment below.

In the misrepresentations made by Strang to Lowry & Bradner there was no active participation by his partners, the Messrs. Holland. But it was proven that the proceeds of the notes last

obtained from plaintiffs, as well as the proceeds of the February notes, all went into the business of Strang & Holland Brothers.

(Disposing of another question.)

The only other question to be determined is, whether the defendants John D. Holland and Joseph Holland can be held liable for the false and fraudulent representations of their partner, it being conceded that they were not made by their direction nor with their knowledge. Whether this action be regarded as one to recover damages for the deceit practiced upon the plaintiffs, or as one to recover the amount of a debt created by fraud upon the part of Strang, we are of opinion that his fraud is to be imputed, for the purposes of the action, to all the members of his firm. The transaction between him and the plaintiffs is to be deemed a partnership transaction, because, in addition to his representation that the notes were for the benefit of his firm, he had, by virtue of his agency for the partnership and as between the firm and those dealing with it in good faith, authority to negotiate for promissory notes and other securities for its use. Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business. *Stockwell v. United States*, 13 Wall. 531, 547-8; Story on Partnership, secs. 1, 102-3, 107-8, 166, 168; *Chester v. Dickerson*, 54 N. Y. 1; *Locke v. Stearns*, 1 Metc. 560; *Lothrop v. Adams*, 133 Mass. 471; *Blight v. Tobin*, 7 T. B. Monroe 612; *Durant v. Rogers*, 87 Ill. 508; Collyer on Partnership, Wood's Ed., secs. 446, 449-50; Lindley on Partnership, Ewell's Ed., sec. 302.

The judgment is affirmed.

NOTE.—See Mechem's Elements of Partn., § 204.

## JAFFRAY, *et al.* vs. JENNINGS, *et al.*

*Supreme Court of Michigan. 1894.*

101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645.

Certiorari to circuit court, Lapeer county; Joseph B Moore, Judge.

Attachment by Howard F. Jaffray and another, copartners, against Ward H. Jennings and Ward L. Jennings, copartners, for a debt due on goods sold and delivered. Judgment for defendants, and plaintiffs bring certiorari. Affirmed.

*Fletcher & Wanty*, for appellants.

*Geer & Williams*, for appellees.

HOOKER, J. Plaintiffs were copartners, residing in New York, and were jobbers, of whom the defendants (father and son, and also partners) purchased goods. The son, Ward L. Jenning, having purchased a quantity of goods for his firm from the plaintiffs, the latter commenced proceedings by attachment upon an affadavit which alleged that the defendants fraudulently contracted the debt upon which the action was brought, viz. that arising from the purchase mentioned. The writ was levied upon property belonging to the father, and upon his application the attachment was dissolved by the circuit judge. It was admitted that at the time of the levy the firm had sufficient personal property out of which the claim could have been satisfied. Defendants' contention is that the individual property of the innocent defendant was not subject to seizure by attachment. Counsel for the plaintiffs build a strong argument upon the doctrine that each partner is an agent of his fellows, citing *May vs. Newman*, 95 Mich. 501, 55 N. W. 364, to the proposition that an attachment lies against a debtor whose agent fradulently contracted the debt. But the statute upon which the remedy by attachment depends has relieved the innocent partner from the application of this rule.

An examination of the statutes may aid in solving this ques-

tion. We start with the proposition that "attachment is a harsh and extraordinary remedy, unknown to the common law; and the statutory provisions upon which the right depends, being in derogation of the common law, must be strictly construed, and cannot be extended beyond their terms." See cases cited in 1 Jac. & C. Dig. p. 96, § 1; *Estlow vs. Hanna*, 75 Mich, 219, 42 N. W. 812. An action against joint debtors is like any other action. It is aimed at the individual debtors. A service on one is not a service upon the other; they may appear separately; their defenses may be different; the judgment is against each for the whole amount; the execution issues against the individuals, the officer being commanded to collect the debt from the goods and chattels, and, for want thereof, of the lands and tenements, of the individuals. And this is as true where the joint obligation is a partnership debt as in cases where the debtors are not copartners.

The act authorizing proceedings in attachment permits any creditor to have an attachment against his debtor, upon conditions mentioned. The conditions are that he shall show that the defendant—i. e. the debtor—is believed to be guilty of certain acts, or to possess certain intentions regarding the debt or his property, fraudulent in character, the general tenor of which indicates danger that such debtor will put his property beyond the reach of the creditor. The law lays hold of the property of such debtor, to preserve it for the creditor. So long as there is a sole debtor, no difficulty is likely to arise, but when the debt is joint the question arises, how far should the fraudulent acts and intentions of one subject the property of another to seizure? The acts, if strictly construed, only provide for attachment against the debtor who is guilty of the fraud. An additional remedy, summary in its nature, is given against him. It is given, in terms, against no others. And where the act is done by one only, the law can only be made applicable to another by invoking the doctrine of agency.

No one will question the fact that one can, through an agent, subject his property to attachment; and this is as true where the agent is a partner as where he is not, and where the act complained of is the fraudulent purchase of goods by a partner, as in this case. There is much persuasiveness in the argument that, as the firm received the benefit and appropriated the fruit of the transaction (whether with knowledge upon the part of

both or not,) the rule that a partner is an agent of his copartners make his act the act of both. It would not be so convincing if the cause for attachment were another of those named in the statute,—e. g. if one only was shown to have an intent to dispose of the firm property, or had actually done so without the knowledge of his partner, or where he absconded, or removed out of the state, or was about to do so, with intent to defraud the firm creditors. Still more hard would be the attachment against one where his copartner had merely resided out of the state for three months, which in itself is ground for attachment regardless of the honesty of his intention.

Can it be said that in all of these cases these acts are partnership acts, binding the partners under this application of the doctrine of agency? Is it true that the creditors of a firm in Michigan, one of the members of which lives in Chicago, have the absolute right to commence all actions against the firm by attachment, and to levy not only on the firm property, but that of each resident member, as well as that of the nonresident? If not, it must be that this doctrine is improperly applied, or a distinction must be drawn between the different causes for attachment named in the statute, and the liability limited to those acts which, we may say, either as a conclusion of fact or law, are the acts of the firm, which would seem to limit the cases to those where the debt was fraudulently contracted, and where the property of the firm had been assigned, concealed, or disposed of with intent on the part of one to defraud the firm creditors. If plaintiff's theory is correct, these would be the acts of all partners, and subject to seizure not only the partnership property, but the individual property of each partner, no matter how honest, and notwithstanding their solvency.

There can be no doubt that partners are bound by the contracts, and many times by the torts, of one of their number, to the extent of liability. But is it as clear that the nature of the remedy is always subject to the same rule? As already stated, this remedy is statutory, and the statutes must show the design to cover such cases as this, or they are not to be treated as within them. The attachment statute is borrowed from New York. It will be found in the Revised Statutes of 1838 and 1846 and the Compiled Laws of 1857. The section of which Howell section 8015, is an amendment remained unchanged from the time of its adoption until 1861. It is section 19, c. 1,

tit. 4, pt. 3, p. 512, Rev. St. 1838. The same is found in Rev. St. 1846, chap. 114, § 30, p. 517, and Comp. Laws 1857, § 4771. It reads as follows, viz.: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, the attachment may be issued against the separate or joint estates or property of such joint debtors or any of them, and the same proceedings shall be had as hereinbefore prescribed."

It goes without saying that under this act, where all of the joint debtors are shown to have participated in the statutory act, or where it appears that each has entertained the fraudulent intent, the writ should issue against all; and it is as plain that in such case the writ could be issued against the separate or joint estates of the debtors. So far it lays down a plain, consistent, and just rule. Shall we go further, and say that it was meant that the writ would be as far-reaching in cases of joint debtors, who are not partners, where one was innocent of wrong? That would probably not be claimed by any one. As to partners, the same claim might be made as is made here, viz. that in dealing with the partnership property the act of one is the act of all, and that the consequences are the same to all. But this act had received a construction before it became a law in Michigan. In the case of Cyrus Chipman, an absconding debtor (14 Johns. 217), decided in 1817, it was held that an attachment might issue against the property of one of several partners who absconds, for a debt due by the firm, although his copartners are resident within the state and subject to process.

This is not conclusive of the question here, and is cited only to show that counsel in that case did not resort to the remedy by attachment against all of the partners. Two years later the same court held that an attachment might issue against the separate property of an absconding debtor upon a debt due from his copartnership. Here, again, the writ appears not to have been sought against the partner who remained. But the case went further, and held that the partnership property could not be seized; and the reason was that the other partner had a right to retain it to pay the partnership debts. *In re* Smith, 16 Johns, 102. It may still be said that in neither of these cases were all of the partners sued in attachment, and therefore there yet remains doubt if the right contended for does not exist under this statute, and it is probable that such doubts led to the amendment of 1861, which reads as follows: "When two or

more persons are jointly indebted as joint obligors, partners, or otherwise, and an affidavit shall be made, as provided in section two of this chapter, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of said section; and the officer shall be also directed in said writ to summon all such joint debtors as may be named in the affidavit attached thereto, to answer to the said action as in other cases of attachment."

Before discussing the statute, let us review the situation. Under the previous statute, attachment lay against all joint debtors, whether partners or not, where it could be shown as matter of fact that all participated in the act constituting a cause. It was also plain that, where one joint debtor only committed such act, his property only was subject to the writ, unless there was a partnership. There was, then, no necessity for legislation to reach either of these cases, for joint debtors, where not partners, were fully protected where innocent of wrong, and the creditor had his remedy against both where both participated, and against the offender where only one was guilty. In this condition of affairs, the legislature passed section 8015, thereby giving immunity from attachment to joint debtors, including partners, who were not themselves participants in the wrongful act. Now, by a construction of this act, it is sought to say that partners are not within its terms, because the act of one is the act of all, and that, as a matter of law, they are, therefore, all participants in the fraudulent act. If that is so, the statute seems to have no office to perform. It has relieved nobody. Joint debtors, not partners, could not be attacked by attachment before unless guilty. But there may have been a doubt about partners. That doubt seems to have caused the enactment of a law whose only object must have been to reach and relieve the very class of cases which the construction contended for seeks to exclude from its protection.

As said at the outset, attachment is a harsh and extraordinary remedy. The law may well restrict its use, and deny it as against all honest persons, though they have the misfortune to be connected in business as partners with dishonest persons. Such persons have legal obligations to discharge in relation to the partnership affairs. They must see that obligations are dis-

charged, and the law presumes that they will faithfully do so. No very good reason suggests itself why the private fortune of an honest partner should be seized because his partner has been detected in a fraudulent act in connection with partnership affairs. It is common knowledge that few men or firms can survive an attack by attachment. It is the almost certain precursor of insolvency, as in former days it was of bankruptcy, and we should hesitate before broadening the scope of the act in question. A case quite similar to the present was before the court, viz., *Edwards vs. Hughes*, 20 Mich. 289. Mr. Justice COOLEY wrote the opinion, and seems to have taken a similar view of these statutes to that expressed above. It is true that the facts in that case may permit it to be distinguished from the present, but the language used is broad, and it is hardly possible that the court could have overlooked the contingency of such cases as this. Since this decision we think the bar have understood that the liability was limited to such partners as personally participated in the fraudulent act. See Tiffany's Justice Guide, p. 62, note 1, where this doctrine is laid down; Shinn, Pl. and Pr. § 307. See, also, *People vs. Circuit Judge*, 41 Mich. 326, 2 N. W. 26, where a writ issued against nonresident partners only. We think the learned circuit judge correct in his conclusions, and that his order dissolving the attachment should be affirmed, with costs. Ordered accordingly.

LONG and GRANT, JJ., concur with HOOKER, J.

MONTGOMERY, J., writes a dissenting opinion. MCGRATH, C. J., concurs with MONTGOMERY, J.

NOTE.—See Mechem's Elem. of Partn., §§ 204-205.

## LOCKE vs. STEARNS.

*Supreme Court of Massachusetts, 1840.*

1 Metc. 560, 35 Am. Dec. 382.

Trespass upon the case against G. L. and H. L. Stearns and G. C. Hall for deceit. They were partners in manufacturing oil and selling linseed meal. The facts sufficiently appear in the opinion. The instructions of which defendants complain were: 1. "That if one of the defendants sold the meal to the plaintiff, such defendant knowing that teelseed meal was of an inferior quality and less value than linseed meal, this knowledge would bind all the defendants, and be the same as if they all knew it"; and 2. "That if L. Richardson, as foreman of the defendants, acting within the scope of his authority, sold the meal to the plaintiff, he (Richardson) knowing that teelseed meal was of an inferior quality and less value than linseed meal, this knowledge would bind the defendants, and be the same as if the defendants knew it." Verdict for plaintiff.

*Farley* for the defendants.

*Buttrick* for the plaintiff.

By Court, SHAW, C. J. Most of the questions in the present case turned upon matters of fact and were decided by the jury. The evidence, taken in connection with the verdict, shows that the purpose of the plaintiff was to purchase of the defendants linseed meal, and that the defendants, who carried on the business of manufacturing oil from seed, so understood it, but that they, that is, one of them personally, when present, and their foreman and general agent, acting within the scope of his authority, when they were absent, delivered to the plaintiff an inferior article, called teelseed meal, mixed with the linseed, in such a manner as to deceive the plaintiff, who purchased and paid for the whole as linseed, without knowledge of such mixture.

The defendants object to two of the instructions of the court

of common pleas as being incorrect in point of law. (Here the chief justice stated the instructions excepted to.) But we are of opinion that both those instructions were right. For although the action in form charges the defendants jointly for a deceit done by one only, or by an agent, yet it is still a civil action, and the claim is for damages. The deceit was done for the defendants' benefit, by their agent acting under their orders, in the conduct of their general business, and responsible to them; and when one party must suffer by the wrong and misconduct of another it is more reasonable that he should sustain the loss, who reposes the confidence in the agent, than he who has given no such confidence: *Hern vs. Nichols*, 1 Salk. 289. The point is well illustrated by the law of insurance, where the party is always held responsible *civiliter* for the fraudulent misrepresentation or other deceit, or for the negligence of his agent. *Fitzherbert vs. Mather*, 1 T. R. 12. But the rule is not confined to cases of insurance, in relation to which a somewhat stricter morality, perhaps, is held to prevail; but it is laid down as a general rule of the common law, that the principal is civilly responsible for the acts of his agent: *Doe vs. Martin*, 4 Id. 66. In a late case, in which it was held that a master was liable for the acts of his servant in a case *quasi* criminal—as for penalties incurred by a violation of the revenue law—it was taken for granted, on all sides, that for deceit in articles sold by a servant in the shop of his master, or for acts done in the manufacture of articles in a manufactory usually carried on by the master, the latter is answerable: *Attorney-general vs. Siddon*, 1 Tyrw. 41; S. C. 1 Cromp. & J. 220. The rule proceeds upon the ground that the servant is acting within the scope of his authority, actual or constructive. The case of a sheriff who is liable *civiliter*, even in an action of trespass, for the misconduct of his deputy is another familiar application of the same rule: *Grinnell vs. Phillips*, 1 Mass. 530.

The rule is laid down generally, in a recent compilation of good authority, that though a principal, in general, is not liable criminally for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit, or other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts; but the wrongful or unlawful acts must be committed in the course of the agent's em-

ployment: 3 Chit. Law of Com. and Man., 209, 210. As to the other point, which is indeed little more than a further application of the same principle, it is laid down as the general rule that one partner is liable *civiliter* for damages sustained by the deceit or other fraudulent act of his copartner done within the scope of his general partnership authority: Collyer on Partnership, 241; *Rapp vs. Latham*, 2 Barn. & Ald. 795; *Willet vs. Chambers*, Cowp. 814.

Two cases were cited by the counsel for the defendant to support the contrary doctrine; but we think they are both distinguishable from the present. In *Pierce vs. Jackson*, 6 Mass. 242, it is said by Parsons, C. J., in the course of his opinion, that "a fraud committed by one of the partners shall not charge the partnership." This must be taken in connection with the subject-matter to which it was applied. That action was not brought by an innocent party who had sustained damage by the fraudulent act of a partner in the course of the partnership business. On the contrary, it was a case of competition between different classes of creditors, one of whom was a creditor of one of the partners, and the other claimed a preference as creditor of the firm. But it appeared that one of the partners had, by fraud and by means of a forged indorsement of a note, given or attempted to give the latter creditor a preference to which he was not entitled. It was in reference to this transaction that the remark above cited was made. The plaintiff in that case must have been in collusion with one of the partners to obtain an undue preference; and to have sustained the claim of preference under those circumstances, would have been to give effect to a fraudulent and collusive act in favor of a party to the collusion, against an honest creditor.

The other case cited was *Sherwood vs. Marwick*, 5 Greenl. 295. In that case two persons were the beneficial owners of a foreign vessel held in the name of a third person. One of them, under a power from that third person, sold the vessel, and at the time of the sale made a false representation of her national character. The other was sued by the purchaser, in an action to recover damages alleged to have been sustained by reason of such false representation. It was held that he was not liable. The defendant and the seller, in that case, were not general partners, if indeed they were partners at all. The seller was not the general agent of the defendant, nor had he any authority,

actual or constructive, to act for him. It seems to us therefore quite clear that the decision in that case is not in conflict with ours in the present.

Exceptions overruled.

NOTE.—See Mechem's Elements of Partn. § 204.

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## LATHROP vs. ADAMS.

*Supreme Court of Massachusetts, 1882.*

133 Mass. 471; 43 Am. Rep. 528.

Action of libel. The opinion states the point. The plaintiff had judgment below.

*D. Saunders, C. P. Thompson* and *C. G. Saunders*, for defendants.

*S. B. Ives, Jr.*, and *G. B. Ives*, for plaintiff.

FIELD, J. (Omitting minor points.)

In a civil action for libel, before the passing of any statute on the subject, the truth of the words published was a defense, whether they were published with or without malice; but if the words published were false, it was no defense that the person who published them believed them to be true, unless the communication was privileged. Except then in cases of privileged communications, it was generally true that evidence of actual malice or the want of actual malice was immaterial to the right of action, and was admissible, if admissible at all, only for the purpose of enhancing or diminishing the damages.

The Gen. Sts., ch. 129, sec. 77, provide that, "In every prosecution and in every civil action for writing or for publishing a libel, the defendant may upon the trial give in evidence the truth of the matter contained in the publication charged as libellous; and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved." This is a re-enactment of the statute of 1855, ch. 396. For previous statutes, see Rev. Sts., ch. 100, sec. 19; ch. 133, sec. 6; St.

1826, ch. 107, sec. 1. Since the passage of the Stat. of 1855, ch. 396, the truth of the words published is no longer an absolute defense; the plaintiff may, notwithstanding the words are true, maintain his action if he can show that they were published with malicious intention.

The defendants in this case were co-partners, engaged in the publication of a newspaper. The court was requested by the defendants to rule "that express malice of one of the defendants could not affect the other defendants, unless it appeared that they participated in such malice; and if the jury should find a verdict on the ground of express malice, they could find it as to those only who were shown to be actuated by such malice." The court refused to give this ruling. The statute undoubtedly, by using the words "malicious intention," means an actual malicious intention, which the defendants in their request properly enough denominate "express malice." The malice which it has been said the law ordinarily implies, in actions of slander or libel, from the uttering or publishing of false defamatory words, is in one sense a fiction, invented to satisfy the forms of pleading. The words "express malice" have been used in contradistinction to the malice which it was said the law implies, to mean actual malice, or malice in fact, which is the same thing as malicious intention. The correctness of the ruling asked for must be determined by the rules of law applicable to civil actions, in which a specific actual intention or purpose must be shown to exist in order to maintain the action. But it has been established, on much consideration, as one of the general principles of the law of agency, that the principal is liable civilly in damages for the torts of his agent done for his benefit in the prosecution of his business and within the scope of the agent's employment, and this rule has been extended to willful trespasses, fraudulent misrepresentations, malicious prosecutions and libels. The greatest difficulty has been felt in extending this liability to corporations aggregate. *Reed vs. Home Savings Bank*, 130 Mass. 443; s. c. 39 Am. Rep. 468, was an action of tort against a savings bank for malicious prosecution. In the opinion Mr. Justice Lord says: "By the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized

agents being imputable to the corporation;" and many authorities are cited. For additional authorities when the action is for libel, see *Aldrich vs. Press Printing Co.*, 9 Minn. 123; *Maynard vs. Fireman's Fund Ins. Co.*, 47 Cal. 207; *Johnson vs. St. Louis Dispatch Co.*, 2 Mo. App. 565.

In *Philadelphia, Wilmington & Baltimore R. R. vs. Quigley*, 21 How. 202, it was held that a corporation may be responsible for the publication of a libel. The court below had instructed the jury that they might find exemplary damages. This was held erroneous, because "the circumstances under which the evidence was collected, and the publication made, repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed;" but the opinion of the majority of the court does not intimate that on proper evidence express malice might not be shown against a corporation. In *Whitfield vs. South Eastern Railway*, El. Bl. & El. 115, which was an action of libel against a corporation, Lord Campbell, C. J., says: "But considering that an action of tort or trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

In *Lawless vs. Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262, which was an action of libel against a corporation, it was held that the publication was prima facie privileged, and that there was no evidence of express malice which ought to have been left to the jury; but it was not intimated that a corporation aggregate could not be guilty of express malice in the publication of a libel. See *Mackay vs. Commercial Bank*, L. R. 5 P. C. 394.

In criminal prosecutions for a libel in this Commonwealth, the liability has been restricted to acts in which the defendant participated, or to which he assented. *Commonwealth vs. Morgan*, 107 Mass. 199, 203. In England at one time the law was thought to be otherwise, but it is now governed by the Stat. of 6 and 7 Vict., ch. 96, sec. 7. *Regina vs. Holbrook*, 3 Q. B. D. 60, and 4 id. 42.

The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.

As partners are the general agents of each other and of the firm, within the scope of the business of the partnership, we think a test of the question we are considering is the liability of the proprietor of a newspaper in damages for a libel maliciously published without his knowledge by his agent whom he has intrusted with the management of the newspaper, and this we regard as well settled. *Shepheard vs. Whitaker*, L. R. 10 C. P. 502; *Dunn vs. Hall*, 1 Ind. 344; *Andres vs. Wells*, 7 Johns. 260; 5 Am. Dec. 267; *Perret vs. New Orleans Times Newspaper*, 25 La. Ann. 170; *Storey vs. Wallace*, 60 Ill. 51.

*Smith vs. Ashley*, 11 Metc. 367, rests on its own facts, and decides nothing in reference to the liability of a principal for the malicious acts of his agent, done for his benefit, in the prosecution of his business within the scope of his employment.

Upon this ground of agency, partners have been held liable in civil actions for the fraudulent or malicious conduct of one of them, done without the knowledge of the others, for the benefit of the partnership and within the scope of its business. *Locke vs. Stearns*, 1 Metc. 560; 35 Am. Dec. 382; *Gray vs. Cropper*, 1 Allen 337; *White vs. Sawyer*, 16 Gray 586; *Durant vs. Rogers*, 87 Ill. 508; *Wolf vs. Mills*, 56 Id. 360; *Chester vs. Dickerson*, 54 N. Y. 1; s. c. 13 Am. Rep. 550; *Guillou vs. Peterson*, 89 Penn. St. 163; *Rex vs. Marsh*, 2 B. & C. 717, 723.

If the liability of the principal for the fraudulent acts of the agent, done within the scope of his employment, be limited to those cases in which the principal derives a benefit from the act of the agent, and a corresponding limitation be put upon the liability of one partner for the fraudulent acts of another, done within the scope of the partnership business, yet when a partnership publishes a newspaper, whatever benefit, if any is derived from the publication of a libel is necessarily received by the partnership.

The statute requires that an actual malicious intention in making the publication shall be found, if the matter published be true; but we are of the opinion that the legislature, in enacting this statute, did not intend to change the rules of law whereby one person is made responsible in damages for the wrongs done by another, but left them to be applied according to the principles which govern the administration of the law; and that the court rightly refused to give the ruling requested.

In the opinion of a majority of the court the entry must be Exceptions overruled.

NOTE.—See Mechem's Elements of Partn., § 204.

# XI.

## OF THE NATURE AND EXTENT OF A PARTNER'S LIABILITY.

### HARALSON vs. CAMPBELL.

*Supreme Court of Alabama, 1879.*

63 Ala. 278.

Appeal from a judgment denying a petition to supersede or quash an execution. The opinion states the facts.

*Bragg* and *Thorington*, for appellants.

*L. A. Dobbs, contra.*

STONE, J. Partnership debts and liabilities, except in limited partnerships, are equally the debts of the firm and each member thereof; and the individual property of the several members, as well as the partnership property, may be taken in executon for the payment of such partnership debt. Partnership debts (under the code in this state, though not at common law) are joint and several, if evidenced by promise in writing, and may be sued on against the members jointly or severally. Code of 1876, Sec. 2905, *Emanuel vs. Bird*, 19 Ala. 596; *Waldron vs. Simmons*, 28 Ala. 629; *Van Wagner vs. Chapman*, 29 Ala. 172. A modification of this principle exists, in cases of bankruptcy and insolvent administration, and a marshalling of assets will sometimes be decreed; but that doctrine has no application to this case, as no bankruptcy or insolvency is averred.

The suit and the judgment in the present case are against W. J. Haralson and Terrence Reynolds, defendants, under the firm name of W. J. Haralson & Co. The mandate of the exe-

cution is, that the sheriff cause the amount of the judgment to be made "of the goods and chattels, lands and tenements, of William J. Haralson and Terrence Reynolds." There was a motion in the court below to quash the execution, because it directed the money to be made out of the individual effects of the defendants, and not out of the partnership property. The circuit court overruled the motion. This suit is not governed by Sec. 2904 of the Code. That section contemplates a suit against the partnership, in its partnership name merely, without naming the individual members composing the firm. In this case the individuals are named, and sued as such. The individual property of each partner is liable to seizure in satisfaction of this judgment. * * *

The judgment is affirmed.

NOTE.—See Mechem's Elem. of Partn. §§ 209 213
See also the two cases next following herein.

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## JUDD OIL CO. vs. HUBBELL.

*Court of Appeals of New York, 1879.*

76 N. Y. 543.

Appeal from an order made upon a motion to set aside a judgment, obtained by the Oil Co. against Hubbell and one Taylor, as copartners. The opinion states the facts.

*Charles H. Tweed*, for appellant.

*George H. Forster*, for respondent.

DANFORTH, J. (After disposing of other matters.) At the outset the plaintiff was called upon "to show cause why the judgment should not be vacated and set aside as irregular, in that a several judgment is entered against the defendant, Hubbell, for $40,950.29, and a several judgment is entered against the defendant, Taylor, for $43,420.70, instead of a judgment against the defendants jointly, pursuant to the summons and complaint; also as unauthorized by law." The moving papers establish beyond controversy that the cause of action was a joint liability on the part of Hubbell and Tay-

for as copartners. This the complaint alleged, the defendant Hubbell by his default admitted, and the defendant Taylor has had that fact found against him by a referee, and by his silence acquiesces in the finding. Upon that determination the plaintiffs, at the same time and by means of the same record or judgment roll, took judgments against the defendants separately, as stated in the order to show cause. This was clearly irregular; but we think it was nothing more. The plaintiffs did not adhere "to the prescribed rule or mode of proceeding," by which they were entitled to a joint judgment, and which a due and orderly conduct of the suit required them to take. But this defect was merely technical and does not affect any substantial right of the adverse party. It does not in any way increase the liability of the defendant, for upon each partner rests an absolute liability for the whole amount of every debt due from the partnership. Parsons on Partnership (2d Ed.) 63; and although originally a joint contract, it may be separate as to its effects. Though all are sued jointly and a joint judgment obtained and a joint execution taken out, yet it may be enforced against one only. Each partner is answerable for the whole, and not merely for his proportionable part; and as the judgments were taken against each partner, for a partnership debt, the partnership property is bound to the same extent as if there had been but one judgment, for the whole, against both partners. *Brinkerhoff vs. Marvin*, 5 Johns. Ch., 326. Nor does the form of the judgment in any way affect the debtor's relations with his copartner; for if he pays the debt or judgment, he will be entitled to contribution or to a credit for the sum paid, in any accounting respecting the partnership affairs.

Motion to set aside judgment denied.

NOTE.—See Mechem's Elem. of Partn., §§ 209, 215, 216.

## MASON vs. ELDRED.

*Supreme Court of United States, 1867.*

6 Wall. 231, 18 L. Ed. 783.

Mason sued, in the circuit court for Wisconsin, Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on Anson Eldred alone, who alone appeared, and pleaded *non assumpsit*. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the state courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership; where, though Elisha Eldred was alone served and alone appeared, judgment in form had passed against all the defendants for the full amount due upon the note.

The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat a recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the circuit court were opposed.

*G. W. Lakin*, for plaintiff.

*J. W. Cary, contra.*

FIELD, J. (After stating the facts.) If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit. *Young vs. Black*, 7 Cranch, 565; *Young vs. Rummell*, 2 Hill, 480. On the other hand, if the note is not thus merged,

it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord MANSFIELD in giving the judgment of the king's bench in *Rice vs. Shute*, 5 Burr. 2611, "that all contracts with partners are joint and several, and every partner

is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a copartnership contract the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several that in a suit against him judgment would pass for the whole demand, if the non-joinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of *Sheehy vs. Mandeville & Jamesson*, decided by this court, and reported in 6 Cranch, 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant, Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the supreme court of New York in the case of *Robertson vs. Smith*, 18 Johnson, 459, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the supreme court of Massachusetts a ruling similar to that of *Robertson vs. Smith* was made. *Ward vs. Johnson*, 13 Mass. 148. In *Wann vs. McNulty*, 2 Gilman, 359, the supreme court of Illinois commented upon the case of *Sheehy vs. Mandeville*, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the supreme court of the United States, it

was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.

In *Smith vs. Black*, 9 Sergt. & Rawle, 142, the supreme court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not."

In its opinion the court referred to *Sheehy vs. Mandeville*, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the supreme court of the United States, was not of binding authority, and it was disregarded.

In *King vs. Hoar*, 13 Meeson & Welsby, 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the court of exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of *Sheehy vs. Mandeville* was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice MARSHALL, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice STORY, in *Trafton vs. The United States*, 3 Story, 651, refers to this case in the exchequer, and to that of *Sheehy vs. Mandeville*, and observes that in the first case the court of exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against

the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged notwithstanding *Sheehy v. Mandeville*, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that state, compiled laws of 1857, vol. 2, chap. 133, page 1219, the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that, "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded. *D'Arcy vs. Ketchum*, 1 Howard 165. Nor is the demand against the parties not sued merged in the judgment

against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterward before the court, if found within the state, that such parties may be sued upon the original demand.

In *Benesteel vs. Todd*, 9 Mich. 379, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the joint debtor act of New York, process in that state having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the supreme court of the state this ruling was held to be erroneous. After referring to decisions in New York, the court said, "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In *Oakley vs. Aspinwall*, 4 N. Y. 513, the court of appeals of New York had occasion to consider the effect of a judgment recovered under the joint debtor act of that state upon the

original demand. Mr. Justice BRONSON, speaking for the court, says: "It is said that the original demand was merged in, and extinguished by the judgment, and consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course; it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

NOTE: See Mecham's Elem. of Partn., §§ 210, 211.

## HALE vs. SPAULDING, *et al.*

*Supreme Court of Massachusetts, 1888.*

145 Mass. 428, 14 N. E. Rep. 584, 1 Am. St. Rep. 475.

Contract, upon an instrument under seal, dated May 23, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff, on demand, six-sevenths of any loss to which he might be subjected as the indorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, etc., and dated May 23, 1885.

At the trial in the Superior Court before HAMMOND, J., it appeared that on September 20, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*W. H. Moody* for the plaintiff.

*H. N. Merrill* for Saltmarsh.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule, that a release to

one joint obligor releases all. *Wiggin vs. Tudor*, 23 Pick. 434, 444. *Goodnow vs. Smith*, 18 Pick. 414. *Pond vs. Williams*, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433. 2 Chit. Con. (11th Am. ed.) 1154 *et seq.* Ex parte Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See *Kenworthy vs. Sawyer*, 125 Mass. 28; *Willis vs. DeCastro*, 4 C. B. (N. S.) 216; *North vs. Wakefield*, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. *Tuckerman vs. Newhall*, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

NOTE.—See Mechem's Elements of Partn., § 212.

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## GOODNOW vs. SMITH.

*Supreme Court of Massachusetts, 1836.*

18 Pick. 414, 29 Am. Dec. 600.

Assumpsit on a joint and several promissory note for five hundred and fifty-one dollars, executed by the defendants Smith and Adams. Plea, by the defendant, Smith, the general issue, the defendant, Adams being defaulted. Smith's defense was, that before the note was due the plaintiff agreed with him, if he would pay half the note and take at par a certain note for a small sum of one Willis, indorsed by the plaintiff, without recourse, he would exonerate and discharge him from payment of the other half; and that he, the said Smith, then paid said

half and took Willis' note as agreed. The jury were instructed: 1. That the consideration for said agreement was sufficient. 2. That the agreement was a covenant not to sue Smith, and as the plaintiff had recourse against the other debtor alone, the agreement must be taken as equivalent to a release to avoid circuity of action. 3. That the agreement was admissible in evidence under the general issue.

*Farley* and *Mellen* for the plaintiff.

*Hoar* and *Mann* for the defendant.

By Court, WILDE, J. This case turns on the distinction between a technical release and a covenant not to sue one of two joint obligors or promisors. The distinction is, that a release to one of two joint and several obligors discharges both, whereas a covenant with one not to sue him is not to be construed as a release, so as to discharge the other obligor. This distinction is well founded on principle, and is supported by all the authorities. In the case of *Lacy vs. Kynaston*, 2 Salk. 575, which was an action on a joint and several obligation, it was decided that a covenant not to sue one of the obligors would not operate as a defeasance or release, because to construe it so would discharge the other obligor; but if the covenantee had been the sole obligor, then the covenant, although not a release in its nature, should be so construed, to avoid circuity of action. The same principles were laid down in the case of *Dean vs. Newhall*, 8 T. R. 168. That also was an action on a joint and several bond, and the defendant pleaded a release to Taylor, the other obligor, upon which issue was joined. At the trial it appeared that the plaintiff had covenanted not to sue Taylor, and in the deed of covenant he had agreed that in case he should sue, etc., that deed "should be a sufficient release and discharge to all intents and purposes, both at law and in equity, to and for the said C. Taylor, etc., and as such should and might be pleaded in bar by him the said C. Taylor." Notwithstanding this agreement, it was held that covenant could not be pleaded in bar as a release and discharge, on the distinction laid down in the case of *Lacy vs. Kynaston*, and in other cases there cited. And these decisions are approved and confirmed in *Hutton vs. Eyre*, 6 Taunt. 289; in *Rowley vs. Stoddard*, 7 Johns. 207; in *Shed vs. Pierce*, 17 Mass. 623; and in *Harri-*

*son vs. Close*, 2 Johns. 448 (3 Am. Dec. 444). It is therefore a well-established principle that although an actual release to one of two joint and several obligors or promisors is a discharge of the debt, and consequently may be pleaded in bar by both of the obligors or promisors, yet that a covenant or agreement with one of several joint obligors, not to sue him, cannot be so pleaded. For if such a covenant or promise not to sue were allowed to operate as a discharge of one of several joint promisors or obligors, the creditor could have no remedy against the other obligor or promisor, although he had expressly or impliedly reserved the right to proceed against him.

This consequence would not follow if the obligation or promise were joint and several; for in such a case the creditor might sue the party with whom no agreement had been made, and there would be no necessity for his resorting to a joint action. But if on this distinction the matter relied on by the defendant, Smith, would amount to a defense to the whole action at common law, the plaintiff being entitled to a separate action against Adams, yet since the stat. 1834, c. 189, no such defense can be maintained. For by that statute the plaintiff is entitled to have judgment against Adams, and Smith may defend himself, we think, in this action in the same manner as he could if the action had been brought against him alone.

It is objected that there was no consideration for the agreement with Smith, but certainly the payment of half the note before it was due, and taking the note of Willis at par, was a sufficient consideration.

We are of opinion therefore that the plaintiff is entitled to judgment against Adams, and that Smith is entitled to judgment for his costs.

NOTE.—See Mechem's Elements of Partn., § 212.

# XII.

## OF DISSOLUTION AND NOTICE.

### HOARD vs. CLUM.

*Supreme Court of Minnesota, 1883.*

31 Minn. 186, 17 N. W. Rep. 275.

Action for an accounting and the winding up of the affairs of a partnership. The plaintiffs in the action are three of the partners and the widow and heirs-at-law of a fourth partner, and the defendant is the only other partner. From the articles which are dated March 15, 1880, it appears that the partnership was formed, under the name of the Clum Compounding Company, for the purpose of manufacturing and selling a medicine, and that the partnership was "to have an existence of thirty years from the date of these articles, unless sooner dissolved by mutual consent." The articles also provide for the taking of inventories at stated times, and that, in case any member of the partnership may wish at any time to dispose of his interest in the business, the other partners are to have the right to purchase such interest by paying its value as determined by the last preceding inventory. The articles then provide that "in case of death of any member of the company, the heirs of such member may retain their interest therein, with all the rights and privileges of the original members; and the administrator of his estate, or the executor under his will, shall represent such heir or heirs at the meetings (or otherwise) of said company, so as to share the burden of management; and in the event that this cannot be done, the company shall have the right to purchase the interest of such deceased member in the same manner, and for the same amount, as in the case of

a member wishing to sell as before stated. Nothing in the foregoing articles is to be construed as meaning that the company is compelled to pay at the inventory price, but it simply gives the right to buy on the above-named terms if it chooses to do so; and each party to this agreement hereby grants such right and privilege to buy such retiring or deceased party's interest on above-named terms; the company reserving the right to buy at better figure and terms if they can." The complaint further alleges the adoption of a resolution, on February 17, 1882, for the discontinuance of business and the dissolution of the partnership, and due notice thereof given to defendant; also the death of one of the partners, on April 1, 1882, and the refusal of each and all of the plaintiffs to purchase the interest of the deceased partner.

Defendant demurred to the complaint on the grounds (1) that there is a defect of parties plaintiff, and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant appealed.

*H. C. Williston*, for plaintiff.

*J. C. McClure*, for appellant.

BERRY, J. 1. An *excess* of parties is not ground of demurrer as "a defect of parties," in the meaning of Gen. St. 1878, c. 66, § 92, subd. 4; Pomeroy on Remedies, § 206; *Richtmyer vs. Richtmyer*, 50 Barb. (N. Y.) 55; *Allen vs. City of Buffalo*, 38 N. Y. 280; *Lewis vs. Williams*, 3 Minn. 95 (151).

2. Three members of a partnership firm and the heirs of a deceased fourth bring this action against the remaining member, for the purpose (1) of having the partnership adjudged dissolved; (2) of having the partnership wound up, and, to that end, an accounting had, a receiver appointed, its assets converted, its debts paid, and the rights of the partners among themselves ascertained and adjusted.

In the absence of previous agreement to the contrary, the death of a partner works a total dissolution of a partnership; that is to say, a dissolution both as respects the deceased and the surviving partners: Pollock on Partnership, § 183; Collyer on Partnership, §§ 103, 106; Story on Partnership, §§ 317, 319 *a*; *Marlett vs. Jackman*, 3 Allen (Mass.) 287; *Roberts vs.*

*Kelsey*, 38 Mich. 602; 1 Lindley on Partnership, 231. A simple provision in the articles for the continuance of the partnership for a fixed period, as, in the present instance, for thirty years, is not such an agreement: Collyer on Partnership, §§ 100, 105; *Crawford vs. Hamilton*, 3 Madd. 251; *Crosbie vs. Guion*, 23 Beav. 518; Story on Partnership, § 319 *a*. Mining partnerships appear to be governed by somewhat different rules: *Jones vs. Clark*, 42 Cal. 180.

In case of such dissolution, the right of surviving partners and of the representative of a deceased partner to have the partnership wound up, and any surplus property distributed, is matter of course; 1 Collyer on Partnership, § 107.

In the case at bar the partnership was dissolved by the death of the partner Hoard. The articles contain no stipulation for the continuance of the business of the concern, except upon specified contingencies, none of which have occurred, and none of which, therefore, cut any material figure in the case. It follows that the three partners plaintiff can maintain this action against the partner who refuses to recognize the dissolution, and to co-operate in closing up and adjusting the business of the concern. As respects their right to maintain it, it is not important that the heirs of the fourth partner, who are joined with them as plaintiffs, have alleged no facts to show that they are proper parties to the action, nor that the executor or administrator of the deceased is not joined; for no objection, as respects *parties*, has been taken, except that there is a *defect* of parties on account of the joinder of the heirs, and this we have disposed of.

Order affirmed.

NOTE: See Mechem's Elem. of Partn., § 245.
See also cases under Subd. VIII, ACTIONS BETWEEN PARTNERS.

## HALSEY vs. NORTON.

*Supreme Court of Mississippi, 1871.*

45 Miss. 708, 7 Am. Rep. 745.

Action by Norton as assignee in bankruptcy of H. F. Giren and D. A. Giren, as members of the firm of Giren, Brown & Co., against Halsey. Judgment below for plaintiff. Halsey appealed.

*W. & J. R. Yerger*, for appellant.

No counsel for appellee.

SIMRALL, J. It is urged for the plaintiff in error that the judgment ought to be reversed because the assignee, Norton, ought to have united with him as co-plaintiff the solvent partner. It was said by the Chief Baron in *Taylor vs. Fields*, 4 Ves. 396, "that the surplus of partnership effects is joint property; and that the interest of each partner is only his share of what remains after the partnership accounts are taken." The assignee takes precisely the position of the bankrupt, as respects the joint property. That interest is transferred to him to be administered for the creditors. Bankruptcy does not divest the title of the solvent partner. It dissolves the copartnership, and constitutes the assignee and the solvent partner tenants in common or joint owners. To stand in a court of law, the plaintiff must have the entire legal right; if the title be held by several, all must join in the suit. *Eckhard vs. Wilson*, 8 Term Rep. 140, and *Murray vs. Murray*, 4 Johns. (N. Y.) ch. 70, are to the point that the assignee and the solvent partner must unite in a suit respecting the joint effects and choses in action. But it must be manifested that there is another person, not co-plaintiff, who ought to, etc.; this may be by plea in abatement, or by nonsuit if proved on the trial (1 Chitty's Plead. 452, 453); or by demurrer if it appears on the face of the declaration. The declaration is thus: "E. E. Norton, assignee, etc., of Henry F. Giren and Dickson A. Giren, as members of the firm of Giren, Brown & Co." It is not averred who com-

pose the firm, except these two bankrupts, nor does it appear affirmatively that there were any other members; the copartnership name may be and often is purely artificial, not discovering who are its members. Proof was not made on the trial that any other person was a member, although objection was made by the defendant to the admission of evidence, in truth of the account, on that ground. If it was not apparent on the record that there was a solvent partner; if the defendant proposed to nonsuit the plaintiff or prevent his recovery, she ought to have proved the existence of such a partner. We do not think that the record presents the point made by the plaintiff in error, so that she can avail of it in this court.

Affirmed.

NOTE: See Mechem's Elem. of Partn., § 247; *Bank vs. R. R.*, *ante*, p. 147.

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## HOWELL vs. HARVEY.

*Supreme Court of Arkansas, 1843.*

5 Ark. 270, 39 Am. Dec. 376.

Bill for an accounting brought by Harvey, alleging that he and one Shanklin sold a store of goods to John Howell and McConnell, taking their notes for the purchase price. That McConnell afterwards withdrew; and Harvey bought his interest, paying therefor his share in the notes. One Smith was afterwards taken in as partner. The remaining facts sufficiently appear from the opinion. Judgment for the complainant. The defendants appealed.

*Linton*, for the appellants.

*Pike* and *Baldwin, contra.*

LACY, J. It is said that the bill should have been dismissed upon the hearing, for the want of proper parties. We think otherwise. The necessary parties were all before the court. The firm of John Howell & Co. was composed of John B. Harvey, John Howell, and John B. Howell, and the record shows that no one else had any interest in their business, or the set-

tlement of their accounts; Shanklin had not the most remote connection with the partnership concern. Harvey bought an interest in a stock of goods of John Howell, and credited a note that he and Shanklin jointly held on Howell and McConnell with the amount of the purchase money. This he had a right to do. Should Harvey have used more than his just proportion of this joint note, he would unquestionably be answerable over to Shanklin; but then it is manifest that this mere possible liability of Harvey would give Shanklin no interest in the partnership concern, nor would it entitle him to be made a party to the present suit. Smith was originally one of the partners with Harvey and Howell, but after continuing in the firm eight or nine months, he sold and conveyed all his interest to John B. Howell, with the consent and approbation of the other partners. As it is evident that John B. Howell was substituted as a partner in the firm in the place of Smith, he of course was subrogated to all the rights and privileges of Smith, who has no interest in the present suit. The rule on the subject of making the necessary parties in suits of equity, is so plain and universal that it can neither be mistaken nor misapplied. All persons should be made parties who have an interest in the matters in dispute, or who may be benefited or injured by the decree. This rule has been followed in the present instance, and therefore it was proper to hear the cause upon its merits: *Wendell vs. Van Rensselaer*, 1 Johns. Ch. 349; *Petch vs. Dalton*, 8 Price, 9; *Duff vs. East India Co.*, 15 Ves. 213, 227. The business was to be conducted in the name of John Howell and Company, and Howell and Harvey were to share an equal moiety of the profits and losses with Smith, and upon the dissolution of the partnership, Smith was to be reimbursed for the excess of his advances with six per cent interest. Smith and Howell agreed to advance the necessary funds, as far as practicable, to keep up a supply of goods, and Harvey was to attend to selling them while at home. Smith, as before stated, sold and conveyed to John B. Howell all his interest on the sixteenth of December, 1838; thereupon Howell was admitted as a partner, with all Smith's rights, and he took upon himself the discharge of all his duties. The bill states that the complainant performed his part of the agreement, and that John Howell and John B. Howell violated their contract, in not furnishing the necessary supplies of goods for

the store; that John Howell went to Philadelphia and bought a large stock of goods and shipped them in his own name, and on his return advertised a dissolution of the copartnership, with the consent of John B. Howell, in the absence of the complainant, and against his will. It avers that John Howell took all the goods, books, and accounts into his own hands, and excluded Harvey from all participation in the business. The bill makes John Howell and John B. Howell defendants, and prays an account may be taken; that the partnership may be continued or dissolved, as the equity of the case may be, and it concludes with a prayer for general relief.

The answers admit most of the material allegations of the bill. The answer of John Howell insists that he, together with Smith, had purchased the necessary supplies for the store, and that he bought the goods at Philadelphia, on his own account and shipped in his own name, and that he excluded the complainant from intermeddling with the partnership effects and from taking charge of the goods of himself, and that he dissolved the firm, as he had the right to do, because the complainant was guilty of gross negligence and misconduct, in not attending to the business of the firm, and in absenting himself unnecessarily from the state.

A partnership, in its most significant and extended sense, is a voluntary contract of two or more persons for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade: Gow. Part. p. 1; Story's Part. p. 1; 1 Poth. Pand. lib. 17, tit. 2; Introd. 1 Domat Civ. L. b. 1, tit. 8, art. 1. This is, substantially, the definition given by all the writers on the subject, and it embraces within its terms and spirit all the principal obligations and duties of the contract. It is perfectly clear, upon principle as well as authority, that wherever the conditions of the partnership are incapable of being fulfilled, or the fruits arising from the agreement can not be properly enjoyed, that such a case furnishes a good cause for the renunciation of either party. Under such circumstances the further continuance of the partnership would be productive of serious inconvenience and great injury to the other partners, and might end in their immediate

ruin or the utter prostration of the business. Story on Part. 419, 421. The same doctrine is fully borne out by the civil law, and is illustrated by the case of a partner, where one of the partners is grievously oppressed with insolvency, or where from some bodily infirmity he is unable to discharge his engagements. The jurisdiction of a court of equity, in cases of copartnership flowing from the peculiar trust and duties growing out of that connection, is of the most extensive and beneficial character. It often declares partnerships utterly void, in cases of fraud, imposition, and oppression in the original agreement; or decrees a dissolution of a partnership which was unobjectionable in its origin, but which subsequent causes have rendered onerous and oppressive; gross misconduct, want of good faith, or criminal want of diligence, or such cause as is productive of serious and permanent injury in the partnership concerns, or renders it impracticable to carry on the business, is good ground for a dissolution at the suit of the injured partner. Habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership, justifies a dissolution; but then it must be a strong and clear case of positive or meditated abuse to authorize such a decree. For minor misconduct and grievances, if they require redress, the court will interfere by way of injunction to prevent the mischief: Story on Part. 414, 415.

The application of the principles here stated will test the conduct of the complainant, and show whether or not the defendant, John Howell, was justified in renouncing the copartnership at the time and under the circumstances of the present case. The proof is somewhat contradictory on this point; still the weight of the testimony, both in respect of numbers and the circumstances detailed by the witness, is clearly with the complainant. The articles of partnership show that the defendants were to furnish the funds to keep up the necessary supplies, when it was in their power to do so, and that the complainant was to attend to selling the goods while he remained at home. The terms of this agreement clearly indicate that the parties never contemplated that slight neglect or accidental failure of their respective engagements should dissolve the partnership. The articles of the partnership conclusively show that the parties themselves looked to unequivocal demonstrations of gross acts of abuse and misconduct,

where the injury would be imminent and irreparable, to authorize a dissolution. It is true that the complainant was absent in Kentucky upon several occasions, but then, business or his family afflictions seem to have called and detained him there; and the proof is that Howell was apprised of his absence, and so far from objecting to his going the last time to Kentucky, or making it a cause of complaint against him, that upon the eve of starting for Philadelphia to purchase goods, he urged the complainant to get back against his return, and be ready to receive the goods. This the complainant tried to do, but was detained by the sickness of his family, and did not arrive until after Howell's return with the goods, which he claims to have purchased for himself, and until after he had published the dissolution of the copartnership. Howell, it seems, never intimated a wish or desire to dissolve the copartnership before he started to Philadelphia. The testimony is that in the opinion of some of the witnesses, the complainant was not a very profitable or attentive partner, but it wholly fails to establish such overt acts of misconduct or gross negligence as would authorize a dissolution of the partnership.

In the present case the partnership was to continue during the pleasure of the contracting parties. It is therefore strictly a partnership at will, and subject to the rules that govern such agreements. Chancellor KENT says, that it is an established principle of the law of partnership, that if it be without any definite period, any party may withdraw at a minute's notice when he pleases and dissolve the partnership. The existence of engagements with third persons will not prevent the dissolution, though their engagements will not be affected by the act. He admits that cases may occur where reasonable notice might be advantageous, but he holds it not to be requisite, and he adds that a party may, in a case free from fraud, choose an unreasonable time for the dissolution. The exception he makes in a case of fraud, indicates to our minds that the rule is not so unbending or universal, as it is laid down, unless the limitation is intended to include those cases where the renunciation is made in good faith and at a proper time. As a general principle, contracts subsisting during pleasure, are naturally and necessarily dissolvable by the mere exercise of the will of either of the parties; and this is the principle according to the civil law under ordinary circumstances, and to

such an extent is it carried that a positive stipulation against the dissolution at the will of either of the parties will be held utterly void, as inconsistent with the true nature and intent of such relation. In cases of equity, we think the true rule to be this,that to enable one partner to dissolve at will the partnership, two things must occur; first, the renunciation of the partnership must be in good faith, and secondly, it must not be made at an unreasonable time. This is the doctrine of the civil law, and of the code of Louisiana, and Pothier lays down the same rule, and inculcates it in the same manner; for he says that no partner has a right to prefer his own particular interest to that of the firm, or to take away its profits, or to appropriate them to his own private advantage, and it is upon this principle, that while a partner is engaged in business, courts of equity will restrain him from like pursuits. He has no right to divert from the firm the diligence, skill, or capital that rightfully belongs to it. The French civil law expresses the whole law upon the subject in the following brief terms: "Dissolution of partnerships," says Domat, "by the will of one of the partners, applies only to partnerships the duration of which is unlimited, and is effected by a renunciation notified to all the parties; provided such renunciation be *bona fide*; and not made at an improper time." Renunciation is held not to be made *bona fide*, where one partner renounces in order to appropriate to himself the profits which the partners are entitled to receive. It is said to be made at an improper time, when the things are no longer entire that were of consequence to partnership, and which should have deferred the dissolution. A partnership for a limited period of time cannot be dissolved at the mere pleasure of one of the parties, within the time prescribed. On the contrary, it only can be dissolved from just motives and for a reasonable cause. There is an implied understanding that the partnership shall continue to the expiration of the term, unless where one partner fails in his engagements, or any habitual infirmity renders him unfit to carry on the business, or where the renunciation is for the benefit of the partnership and not for the advantage of the dissolving partner. The principle here stated is extracted from all the authorities by Justice STORY, and fully approved by him in his complete and admirable treatise upon partnerships. In cases where the partnership is to endure for a limited

period of time, the question, whether within that period it may be dissolved by the mere act and will of one of the partners, without the consent of the others, is not definitely or absolutely settled, says Justice STORY, in our jurisprudence. He clearly intimates, if ever such a case should arise, where one partner claimed the right, *sua sponte*, of dissolving the partnership, that he possesses no such power; and he takes the distinction between a court of equity dissolving the partnership, and that of a partner, acting upon his own caprice and pleasure, dissolving the engagement. He admits the doctrine to be somewhat different according to the Roman law; but he denies that a partner has a right to found his own claim to immediate indemnity and safety by committing a known injury on the interest and privileges of his copartners: and in this opinion he is sustained by many elementary writers and a number of adjudged cases of unquestionable authority: Gow. on Part. c. 5, sec. 1, 219, 225, 226, 288; 3 Coll. Part. b. 1, c. 2, sec. 2, p. 62, 2d Ed.; Kent's Com. sec. 43, pp. 61, 4th Ed.: *Peacock vs. Peacock*, 16 Ves. 56; *Crawshay vs. Maule*, 1 Swans. 495; *Pearpoint vs. Graham*, 4 Wash. C. C. 234.

The partner who breaks off the partnership with an unfair design, or for selfish objects, discharges his copartners from all liabilities to him, but he does not thereby free himself from his obligations to them. When he quits the partnership, that he may buy for himself what the partnership has a right to purchase, or that he may make a profit for his own advantage and to their prejudice, he is answerable to the community for the loss and damage; and so, if he quits at an unreasonable time, which occasioned a deprivation of profits to the community, it is but right he should repair and make good such loss: Poth. Pand. lib. 17, tit. 2, n. 64-68; Domat, b. 1, tit. 8, sec. 5; arts 1-8, by Straham; Story on Part. 383-420.

The proof in this case clearly shows that Howell renounced the partnership for his own private advantage, and not to benefit the firm. He said nothing to his partner of his wish to dissolve until his return from Philadelphia. He then advertised a dissolution of the firm, and seized all the goods and effects into his own hands. While he was in partnership with Harvey, he had no right to purchase the goods in his own name; for in doing so he would have acted in bad faith, and besides, Harvey would have been answerable for the purchase.

Was it more to Howell's interest, or to the firm's, that the dissolution should take place at the time it did? The answer to this inquiry is neither difficult nor doubtful. At the time Howell published the dissolution of the copartnership, merchants were realizing large profits upon their stock, and goods were sold readily at an advance of fifty to one hundred per cent. Did he not dissolve the partnership that he might buy for himself and realize this profit? Were not the other partners of the firm prejudiced in their business, and he benefited by the transaction? Were not his motives sinister and selfish, and did he not withdraw from the community at an unwarrantable time and in bad faith? The proof leaves no doubt upon this subject, and if the rules and principles above stated be correct, then he is unquestionably answerable to the complainant for the damages he may have sustained. That damage seems to have been calculated and awarded upon a correct basis. The chancellor, in rendering the decree, debited and credited each of the partners in conformity to the articles of agreement, with their respective advances and expenditures, taking a list of the notes and accounts furnished by the books, and properly auditing them; and he then charged Howell with fifty per cent profit upon the whole amount of goods he purchased at Philadelphia, as well as the stock on hand belonging to the firm. In this calculation and adjustment, we perceive no error.

Decree affirmed.

NOTE: See Mechem's Elem. of Partn., §§ 237, 251.
Compare with following case.

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## SOLOMON vs. KIRKWOOD.

*Supreme Court of Michigan, 1884.*

55 Mich. 256, 21 N. W. Rep. 336.

The plaintiffs, who are, in the city of Chicago, dealers in jewelry, seek to charge the defendants, as partners, upon a promissory note for $791.92, bearing date November 9, 1882, and signed "Hollander & Kirkwood." The note was given by the defendant Hollander, but Kirkwood denies that any part-

nership existed between the defendants at the date of the note.

The evidence given on the trial tends to show that on July 6, 1882, Hollander & Kirkwood entered into a written agreement for a partnership for one year from the first day of the next ensuing month, in the business of buying and selling jewelry, clocks, watches, etc., and in repairing clocks, watches, and jewelry, at Ishpeming, Michigan. Business was begun under this agreement, and continued until the latter part of October, 1882, when Kirkwood, becoming dissatisfied, locked up the goods and excluded Hollander altogether from the business. He also caused notice to be given to all persons with whom the firm had had dealings that the partnership was dissolved, and had the following inserted in the local column of the paper published at Ishpeming: "The copartnership heretofore existing between Mr. C. H. Kirkwood and one Hollander, as jewelers, has ceased to exist, Mr. Kirkwood having purchased the interest of the latter." This was not signed by any one.

A few days later Hollander went to Chicago, and there, on November 9, 1882, he bought, in the name of Hollander & Kirkwood, of the plaintiffs goods in their line amounting to $791.92, and gave to the plaintiffs therefor the promissory note now in suit. The note was made payable December 15, 1882, at a bank in Ishpeming. When the purchase was completed Hollander took away the goods in his satchel. The plaintiffs had before had no dealings with Hollander & Kirkwood, but they had heard that there was such a firm, and were not aware of its dissolution. They claim to have made the sale in good faith, and in the belief that the firm was still in existence. On the other hand, Kirkwood claimed that Hollander and the plaintiffs had conspired together to defraud him by a pretended sale to the firm of goods which the plaintiffs knew Hollander intended to appropriate exclusively to himself; and he was allowed to prove declarations of Hollander which, if admissible, would tend strongly to prove such a conspiracy.

The questions principally contested on the trial were—*First*, whether the acts of Kirkwood amounted to a dissolution of the partnership; *second*, whether sufficient notice of dissolution was given; and, *third*, whether there was any evidence to go to the jury of an understanding between Hollander and the

plaintiffs to defraud Kirkwood. The trial judge, in submitting the case to the jury, instructed them that Kirkwood, notwithstanding the written agreement, had a right to withdraw from the partnership at any time, leaving matters between him and Hollander to be adjusted between them amicably or in the courts; and for the purposes of this case it made no difference whether Kirkwood was right or wrong in bringing the partnership to an end; if wrong, he might be liable to Hollander in damages for the breach of his contract. Also, that when partners are dissatisfied, or they cannot get along together, and one partner withdraws, the partnership is then at an end as to the public and parties with whom the partnership deals, and neither partner can make contracts in the future to bind the partnership, provided the retiring partner gives the proper notice. Also, that if they should find from the evidence that there was trouble between Hollander and Kirkwood prior to the sale of the goods and the giving of the note; that Kirkwood informed Hollander, in substance, that he would have no more dealings with him as partner; that he took possession of all the goods and locked them up, and from that time they ceased to do business—then the partnership was dissolved. Further, that whether sufficient notice had been given of the dissolution was a question for the jury. Kirkwood was not bound to publish notice in any of the Chicago papers; he was only bound to give actual notice to such parties there as had dealt with the partnership. But Kirkwood was bound to use all fair means to publish as widely as possible the fact of a dissolution. Publication in a newspaper is one of the proper means of giving notice, but it is not absolutely essential; and on this branch of the case the question for the jury was whether Kirkwood gave such notice of the dissolution as under the circumstances was fair and reasonable. If he did, then he is not liable on the note; if he did not, he would still continue liable.

The judge also submitted to the jury the question of fraud in the sale of the goods. The jury returned a verdict for the defendants. Plaintiff brings error.

*Ball & Hanscom*, for appellants.

*W. P. Healy*, for appellee.

COOLEY, C. J. (After stating the facts as above.) I. We think the judge committed no error in his instructions respect-

ing the dissolution of the partnership. The rule on this subject is thus stated in an early New York case: The right of a partner to dissolve, it is said, "is a right inseparably incident to every partnership. There can be no such thing as an *indissoluble* partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it:" *Skinner vs. Dayton*, 19 Johns. (N. Y.) 513, 538, 10 Am. Dec. 286. To the same effect are *Mason vs. Connell*, 1 Whart. (Pa.) 381, and *Slemmer's Appeal*, 58 Pa. St. 155. There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsbility would exist in breaking a contract of partnership as in other cases.

II. The instruction respecting notice was also correct. No court can determine for all cases what shall be sufficient notice and what shall not be; the question must necessarily be one of fact. Publication of notice of dissolution in a local newspaper is common, but it is not the only method in which notice can be given. The purpose of the notice is to make notorious in the local community the fact that a dissolution has taken place; and publication of a notice may or may not be the most effectual means for that purpose. Very few persons in any community probably read all the advertisements published in the local papers; and matters of local importance

which are advertised are quite as likely to come to them from other sources as from the published notices.

That publication in a newspaper is sufficient, is not disputed by the defense, provided it appears on its face to be authoritative: *Ketcham vs. Clark*, 6 Johns. (N. Y.) 144; 5 Am. Dec. 197; *Graves vs. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *National Bank vs. Norton*, 1 Hill (N. Y.), 578; *Nott vs. Downing*, 6 La. 680; 26 Am. Dec. 491; *Watkinson vs. Bank of Pennsylvania*, 4 Whart. (Pa.) 482; 34 Am. Dec. 521; *Rose vs. Coffield*, 53 Md. 18; 36 Am. Rep. 389. But in this case it is said the notice did not appear to be authoritative; it appeared as a local editorial item, and such items are often baseless, and may in any particular case have no better foundation than rumor or even suspicion. They do not bear upon their face the verity which a notice signed by the party would import.

All this may be true without being conclusive. When the purpose is to put the fact of dissolution before the public, it certainly cannot be affirmed that the purpose is more likely to be accomplished by a formal advertisement than by an item in the local column of the newspaper. Many publishers, it is believed, have in their papers a local column in which items appear which seem on their face to be editorial, but which are really advertisements; and not only paid for, but paid at extra rates, for the reason that in that column they would be more likely to be seen and read than if published as advertisements in the ordinary way. When such is the case, a court could hardly hold as matter of law that the advertisement would be sufficient, but the notice in the local column not. To do so would be to make form more important than the purpose to be accomplished. One who derives knowledge of the fact from public notoriety is sufficiently notified: *Bernard vs. Torrance*, 5 Gill & J. (Md.) 383; *Halliday vs. McDougall*, 20 Wend. (N. Y.) 81; and probably in many small communities a fact would sooner be made notorious by a notice in the local column of the county or village paper than in any other way. In a large city it might be otherwise. But all that can be required in any case is that such notice be given as is likely to make the fact generally known locally: *Vernon vs. Manhattan Co.*, 22 Wend. (N. Y.) 183, 193; *Lovejoy vs. Spafford*, 93 U. S. 430. When that is done the party giving the notice has performed his duty, and any one contemplating for the

first time to open dealings with the partnership must at his peril ascertain the facts. This, in effect, was the instruction given.

III. But we think the judge erred in receiving evidence of Hollander's admissions or declarations tending to show fraudulent collusion between him and the plaintiffs. The declarations of a conspirator may be evidence against his associates after the conspiracy is made out; but to receive them as proof of the conspiracy would put every man at the mercy of rogues. We find in this case no evidence of the conspiracy except in the statements of Hollander; and those having been erroneously received, there was nothing on that branch of the case to submit to the jury.

For this error there must be a new trial.

NOTE: See Mechem's Elem. of Partn., § 240.

See especially *Karrick vs. Hannaman*, 168 U. S. 328, 18 Sup. Ct. Rep. 135.

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## GERARD vs. GATEAU.

*Supreme Court of Illinois, 1876.*

84 Ill. 121, 25 Am. Rep. 438.

**Bill for dissolution of partnership, etc. The facts appear in the opinion.**

*Emery A. Storrs*, for appellant.

*Geo. W. Cass, R. Biddle Roberts, and E. Harvey*, for appellee.

SCOTT, J. The copartnership between the parties to this litigation was for the manufacture and sale of zinc roofing and zinc and other metal ornamental work. It was formed in January, 1872, and was to continue through a period of ten years. Although equal partners the capital put in was not equal. Complainant put in $12,000 in cash, and defendant was the owner of plaster of Paris dies which would be needed in the business of the firm, and which were rated to him as capital at $3,500. It was stipulated that the firm was to pay interest on the excess of capital put in by complainant, and it was secured to him upon the stock of the firm.

In the articles of copartnership it was provided what causes should operate as a dissolution: First, death of either party; and second, "incapacity, embezzlement or gross neglect or misconduct of either party." On account of the latter causes either party could have the firm dissolved by giving thirty days' notice to the other party, of such intention, stating in such notice his grounds and reasons for so doing. After the lapse of a little over two years complainant filed this bill for a dissolution of the copartnership, for an account and for an injunction restraining defendant from interfering with the affairs of the company. No notice was given of his intention, as provided in the articles of copartnership, to ask a dissolution, but without regard to the agreement, complainant invokes the general powers of a court of chancery.

It is not set forth in the bill, that defendant is wanting in capacity, or that he has been guilty of embezzlement or any other act affecting his integrity of character. Among the causes alleged for a dissolution of the copartnership is, the plaster of Paris dies, formerly owned by the defendant, were put in as capital at a sum greatly in excess of the real value. Conceding the fact, we do not understand it would constitute any ground for canceling the partnership contract. On the dissolution of the copartnership, by lapse of time or otherwise, equities between the parties arising out of this cause, could be adjusted. But upon the principal fact, as to the value of the dies, the evidence is quite conflicting, and if trying the case as an original question, we would be at a loss to determine with which party is a preponderance of the testimony. Certainly there is no decided preponderance in favor of complainant.

With regard to the overcharge on the work for Oxley & Co. for work done under a special contract for that company it is hardly of sufficient importance to deserve much consideration. It was ornamental work of elaborate design, to be used on the State House and as to the actual cost of the material and labor, persons skilled in that department of labor differ widely in their estimates. It may or it may not have been an overcharge. There is nothing that shows defendant acted corruptly in the matter. The differences in regard to the price charged were afterward adjusted with the parties in interest, and no harm came to complainant.

Another cause of complaint is, the prosperity of the firm was impaired by the personal bearing of defendant toward customers. If the inventory taken of the assets of the firm is anywhere near correct, it cannot be the prosperity of the concern was in any great degree affected by the conduct of defendant, whatever it may have been. An unusual measure of success seems to have attended their affairs. In the brief period the firm had been doing business, according to the testimony, the assets of the company had more than doubled, without contracting any considerable amount of indebtedness.

The charge is, defendant had an irascible temper, was insolent in his deportment, or, as one of the witnesses expressed it, was "high and mighty with customers." Evidence introduced shows that, while defendant was disagreeable, and perhaps wanting in courtesy to some, with others he was always pleasant and affable. It is shown that for some time before and after the formation of the copartnership, the social relations of the partners were of the most friendly character. The causes that interrupted those relations were not more serious in their nature than the annoyances that often attend the transaction of any business. We find no well considered case going to the extent that such defect as indicated in the character of one partner would justify a dissolution of the copartnership contract. Should such a rule be adopted it is apprehended, on account of the infirmities of character, no association of persons for the transaction of business would endure for any great length of time.

As was said by this court in *Cash vs. Earnshaw*, 66 Ill. 402, it is not for every act of misconduct on the part of one partner, a court of equity, at the instance of another, will dissolve the partnership and close up the affairs of the company. The court will require a strong case to be made, and it is laid down as a general principle, a court of equity has no jurisdiction to declare a separation between partners for trifling causes or temporary grievances, involving no permanent mischiefs. That defendant's conduct toward some of the customers of the firm is subject to severe criticism admits of no doubt, but that it worked any permanent mischief to the partnership interests is not established by any evidence in the case.

The debatable point in the case is, as to the personal relations between the partners, and whether the hostile relations

existing are justly attributable to the unreasonable conduct of defendant. This is always a difficult question, and cases differ so essentially in their constituent elements, that we find no accurate and distinct definitions on this branch of the law. That such embittered relations may exist as would render it impracticable to conduct the business, and justify a decree dissolving the partnership, admits of no discussion, on principle as well as upon authority. Permanent mischiefs would be the result that could only be avoided by a severance of the partnership relations. But that is not the case here. Under the copartnership articles defendant had the principal control of the affairs of the company. Complainant was not obliged to give any more personal attention to the business than he chose to bestow. Defendant was a skilled workman in their business, and complainant was not. This fact was well understood and canvassed before the partnership was formed. Although the social relations between the partners were not what they ought to have been it is not perceived how the existing ill-feeling could seriously impair the prosperity or interfere with the management of the firm affairs. By positive agreement the business was under the principal control of defendant, and, notwithstanding the want of cordiality, it might be carried on with equal success.

In all the cases we have examined, where the partnership has been dissolved on account of the unfriendly relations between the partners, it has generally been at the instance of a party who was not himself at fault, and where the estrangement was such as would prevent the successful management of the business. A party who is the author of the ill-feeling between himself and partners ought not to be permitted to make the relation he has induced the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other had been guilty of no wrongful act or omission of duty. The results flowing from the premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise.

Complainant's conduct in relation to the affairs of the company is not altogether blameless, and it may be, defendant's

conduct, to which exceptions are taken, was induced, in some measure, by his own action. Principally, it seems, the ill-feeling between the partners was engendered by the employment of a nephew of complainant as a traveling salesman for the house. It was done against the wishes of defendant, and proved, as he anticipated, unprofitable. This young man had before been discharged from the service of the firm on account of his incapacity, and the last employment seems to have been because complainant became responsible for his successful management. A loss ensued, and it was in regard to the salary and traveling expenses of this salesman the parties disagreed. Evidence offered tends to show complainant was in the wrong; but, however, that may have been, it ought not to have affected, permanently the social relations of the partners.

We have given this case a most careful consideration, and we can see nothing that would prevent, among reasonable men, a harmonious co-operation between the partners, so far as any is necessary to a profitable prosecution of the common business of the firm, and hence, no reason is perceived for dissolving the partnership.

The decree dismissing the bill and dissolving the injunction will be affirmed.

Decree affirmed.

NOTE: See Mechem's Elem. of Partn., § 256.
See also *New vs. Wright, ante.*

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## AUSTIN vs. HOLLAND.

*Court of Appeals of New York, 1877.*

69 N. Y. 571, 25 Am. Rep. 246.

Action on a promissory note dated August 31st, 1869, signed in the firm name of Dillon, Beebe & Co., and payable to Horace Loveland.

Defendant Holland alone appeared and answered, admitting the making of the note and that plaintiff was the holder, but denying that he was a member of the firm.

Defendants were copartners in the lumber business under said firm name prior to March 29th, 1869, having their principal office in Toledo, Ohio. Loveland, who lived in Detroit was employed by the firm to purchase lumber in the western states and Canada. The note in question was given for his services. A notice of dissolution was published in the Toledo papers and a copy was mailed to plaintiff at Detroit.

Loveland, as a witness for plaintiff, was asked if he received the notice. This was objected to on the ground that it, having been shown that notice was published and a copy mailed to witness, this was sufficient to relieve defendants from liability, and it was immaterial whether the notice was received or not. The objection was overruled and exception taken. Witness answered that he did not. Upon cross examination he testified that he had no recollection of receiving or seeing the notice, and that if he had he should have borne it in mind. Defendant's counsel moved for a nonsuit on the same ground as stated on objection to evidence of non receipt of notice; also upon the ground that the evidence on the part of plaintiff was insufficient to rebut the presumption of the receipt of notice; also that an employe of a firm is not a dealer within the meaning of the law merchant requiring notice of dissolution.

The motion was denied, and said counsel duly excepted. The court submitted to the jury the question whether the notice was actually received, to which defendant's counsel excepted.

***Esek Cowen*, for defendant.**

***Martin I. Townsend*, for plaintiff.**

ANDREWS, J. The plaintiff was a dealer with the firm of Dillon, Beebe & Co., so as to entitle him to the protection of the rule which makes a retiring partner liable for subsequent engagements made by his former copartner in the firm name, with those who had previous dealings with the firm, and who entered into the new transaction without notice of the change in the partnership. In *Vernon vs. The Manhattan Co.*, 22 Wend.

(N. Y.) 190, the chancellor said: "The word 'dealing' is merely used as a general term to convey the idea that the person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership," and this statement of the chancellor is recited with approval by DENIO, J., in *Clapp vs. Rogers*, 12 N. Y. 286.

There does not seem to be any reason for distinguishing the case of an agent who is in the employment of the firm at the time of the dissolution, and who thereafter, without notice of the dissolution, continues under the same apparent employment, from that of a person who has had mercantile transactions and relations with the firm, as a vendor or otherwise. In each case the credit is presumed to have been given originally upon the responsibility of the individual members of the partnership, and justice requires as much in the one case as the other that all the members should be bound so long as the partnership may be supposed to exist. Watson on Part. 384.

The principal question in this case is, whether Loveland had notice of the dissolution of the firm of Dillon, Beebe & Co., which occurred March 29, 1869, prior to August 31, 1869, when the note upon which the action was brought was made. The firm was engaged in the business of the purchase, shipment and sale of lumber, and its principal office was at Toledo, in the state of Ohio. The plaintiff was employed to purchase lumber in the western states and in Canada, and resided at Detroit. Notice of the dissolution was published in the newspapers at Toledo, and a copy was mailed to the plaintiff, addressed to him at Detroit.

Loveland, on his direct examination, testified positively that he never received a notice. On his cross-examination, he stated that he had no recollection of receiving or seeing the notice, and that, if he had seen it, he thought he should have remembered it. The judge submitted it to the jury to find whether the plaintiff received the notice. The defendant's counsel excepted to the submission of the question to the jury on the ground that the jury would not be justified in finding from the evidence that the plaintiff did not receive the notice, and upon the further ground that it was immaterial whether he received it or not; that the mailing of the notice was all that the defendant was required to do to protect him from liability for the subsequent services of the plaintiff.

The publication of notice of the dissolution of a partnership in a newspaper at the place where the business was carried on is notice to all persons who had not had prior dealings with the firm; and, if thereafter one of the partners enters into a contract in the firm name with a new customer or dealer, the other partners will not be bound. The rule is different in respect to persons who have dealt with the firm before the dissolution. The rule in such cases in this state requires that, to relieve a retiring partner from subsequent transactions in the partnership name, notice of the dissolution must be brought home to the person giving credit to the partnership. If, in any way, by actual notice served, or by seeing the publication of the dissolution, or by information derived from third persons, the party, at the time of the dealing, is made aware of the fact that the partnership has been dissolved, the contract will not bind the firm. It is sufficient to exempt the firm from liability that the person so contracting with a partner in the firm name knew or had reason to believe that the partnership had been dissolved, but this must appear and be found by the jury, or else the contract will be treated as the contract of the partnership: *Ketcham vs. Clark*, 6 Johns. (N. Y.) 144; 5 Am. Dec. 197; *Graves vs. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *Vernon vs. Manhattan Co.*, 17 Wend. (N. Y.) 524; 22 Id. 183; *Nat. Bk. vs. Norton*, 1 Hill (N. Y.), 572; *Coddington vs. Hunt*, 6 Id. 595; *Clapp vs. Rogers*, 12 N. Y. 287; *City Bank vs. McChesney*, 20 Id. 242; *Bank of Commonwealth vs. Mudgett*, 44 Id. 514; *Van Eps vs. Dillage*, 6 Barb. (N. Y.) 244; *Mechanics' Bank vs. Livingston*, 33 Id. 458. In *Vernon vs. The Manhattan Co.*, the chancellor says: "But to exempt the copartners from liability (on a contract with a previous dealer with the firm), the jury must be satisfied that the person with whom the new debt was contracted either had actual notice that the copartnership was dissolved, or that facts had actually come to his knowledge sufficient to create a belief that such was the fact." The same rule is recognized in the other cases cited, and by elementary writers: 3 Kent's Com. 607; Story on Part. sec. 161; Coll. on Part. sec. 533; Lindley on Part. 337. Lindley says: "Those who have dealt with the firm before a change took place, are entitled to assume, until they have notice to the contrary, that no change has occurred. * * If notice, in point of fact, can be established, it matters not by what means

for it has never been held that any particular formality must be observed." In this case, the jury have found that the plaintiff did not receive the notice sent by mail, and had no information of the dissolution of the firm of Dillon, Beebe & Co. prior to the transaction in question. The mailing of notice properly directed to the party to be charged raises a presumption of notice in fact, for it is presumed that letters sent by post to a party, at his residence, are received by him in due course. Best on Presumptions, sec. 403. But this is a presumption of fact, and not of law, and may be repelled by proof; and, if the receipt of the letter in this case was disproved, then the defendant failed to show the actual notice required in order to exempt him from responsibility, and the question whether the letter was received was, we think upon the evidence, for the jury. The learned counsel for the defendant has not referred us to any case which decides that the mailing of a notice of dissolution is in law equivalent to actual notice, and exempts a retiring partner from liability to prior dealers on subsequent engagements in the firm name. Notice by mail of the dishonor of commercial paper is in most cases sufficient by the law merchant to charge an indorser. It is a part of the contract that notice may be given in this way, and it is not material in fixing the liability of the indorser whether he receives it or not.

But we think the rule requiring actual notice of the dissolution of a partnership to prior dealers is a part of the law of this state, and should not be departed from. It may subject parties in some cases to inconvenience, but the principle upon which the rule proceeds is that, when one of two parties is to sustain injury from the giving of credit, the one who originally induced it should bear the loss, rather than the one who, without notice of the change, relied upon the continued existence of the partnership: Story on Part. sec. 160; Wat. on Part. 384.

The judgment of the general term should be affirmed.

All concur, except MILLER, J., not voting.

Judgment affirmed.

NOTE: See Mechem's Elem. of Partn., § 363, and notes.

# ROSE vs. COFFIELD.

*Court of Appeals of Maryland, 1879.*

53 Md. 18, 36 Am. Rep. 389.

Action on a check. The opinion states the case. The plaintiff had judgment below.

*William A. Stewart* for appellant.

*Thomas B. Horwitz* for appellee.

MILLER, J. This suit was brought by the appellee against the appellants, Rose and Porter, as partners, composing the firm of "J. B. Rose & Co.," upon a check, of which the plaintiff was the indorsee and holder. This check was upon the Citizens' National Bank for $430, was dated the 29th of November, 1871, and was payable on the 2d of December following. It was drawn by "Eastman & Rogers," to the order of "J. B. Rose & Co.," and bears the indorsement of the payees and also of two other firms. The proof shows that this check was given in renewal of a promissory note for the same amount, dated the 27th of October, 1871, payable one month after date, drawn and indorsed by the same firms, and also indorsed by another firm. The plaintiff received this note on the day of its date, from Rose, in good faith, and paid him therefor $430 in cash. He also received the check in renewal of the note on the day of its date from Rose, who then indorsed the name of "J. B. Rose & Co." thereon. At the date of the note and for some years prior thereto Rose & Porter had been partners, conducting the printing business under this firm name, Rose being the active business manager of the firm. On the 16th of November, 1871, after the date of the note, but before the check was given, the firm was dissolved, and notice of the dissolution published in the newspapers of Baltimore city for several days. But there is no proof that the plaintiff took or read either of the papers in which this publication was made, and there is therefore nothing in the case bringing home to him actual notice of the dissolu-

tion or affecting him with notice thereof. *Boyd vs. McCann*, 10 Md. 118. In this state of case the question arises whether Porter is liable upon this check, the firm having been in fact dissolved before Rose indorsed the firm's name thereon.

It is familiar law that after dissolution one partner cannot impose new obligations on the firm, or vary the form or character of those already existing. *Ellicott vs. Nichols*, 7 Gill 85, 100; *Bell vs. Morrison*, 1 Pet. 351, 370. He has no authority after dissolution to give a note in the firm's name, even though its consideration be a pre-existing debt of the firm, nor to renew an existing note of the dissolved firm, for these constitute *new contracts*, and cannot therefore bind his former partner. *Hurst vs. Hill*, 8 Md. 399; *Hopkins vs. Boyd*, 11 id. 107; *Martin vs. Kirk*, 2 Humph. 529; *National Bank vs. Norton*, 1 Hill 572. But to this general rule there are certain well defined and clearly established exceptions or qualifications. For instance, the agency of each partner to bind his copartners can only be effectually determined by giving notice of its revocation. The principle is therefore now well established that where a partnership is *voluntarily* dissolved, or one of the ostensible or known partners retires from the firm (which is in fact a dissolution), and there is no public notice of the dissolution given, by publication in a newspaper or otherwise, the power of each to bind the rest as to third persons, who have no knowledge of the dissolution, remains in full force, although as between the partners themselves, a dissolution or a retirement is a revocation of the authority of each to act for the others; and hence if a known partner retires, and no such notice is given, he will be liable to be sued in respect to a promissory note made after his retirement by his late partner in the name of the firm—even though the plaintiff may have had no dealings with the firm previous to the retirement or before the making of the note. Lindley on Partnership, 327; *Parkin vs. Carruthers*, 3 Esp. 248; *Williams vs. Keats*, 2 Stark. 290; *Mulford vs. Griffin*, 1 Fost. & Fin. 145; *Anderson vs. Weston*, 6 Bing. N. C. 296; *Ketcham vs. Clark*, 6 Johns. 144; 5 Am. Dec. 197; *Dickinson vs. Dickinson*, 25 Gratt. 321. In such cases the law regards the contract as made with the firm and on *their credit*, and holds the retiring partner liable, upon the principle that where one of two innocent persons must suffer from giving a credit, he who has misled the confidence of the other, and has been the cause of

the credit, either by his representations or his negligence, ought to suffer instead of the other. Again, while public notice by advertisement, such as was given in this case, may suffice to conclude all persons who have not had any previous dealings with the firm, it will not be sufficient as to those who have had such dealings. All the authorities agree that as to persons who have previously dealt with the firm, it is requisite that actual notice of the dissolution should be brought home to them, or at least that the credit should be given under circumstances from which actual notice may be inferred. Story on Part., sec. 161; Pars. on Part. 412. But what will amount to such previous dealing as to entitle a party to notice of this kind is sometimes a difficult question, and this in fact is the real and only point of difficulty in the case before us.

It has been argued with much force that the plaintiff had but a single transaction with this firm before its dissolution, which consisted simply of the purchase by him of the note of the 27th of October, and that this did not amount to such *dealing* with the firm, as to entitle him to actual notice. So far as our researches have extended, the cases in which this question has been considered are not numerous, and those in which the decisions have necessarily turned upon it are very few. It is certain that no inflexible rule or standard of dealing, by which all cases can be governed or measured, has been established. There was a very able discussion of the question in the Court of Errors of New York in the case of *Vernon vs. Manhattan Co.*, 22 Wend. 183. In that case a note for $5,000 was given by Vernon & Co., in December, 1831, payable to Moore. It was indorsed by another firm after Moore's name, and in that shape was discounted by the bank for Moore's accommodation. There were then several renewals of it in the same form, with payments reducing the amount until the 15th of April, 1833, when the note sued on for the balance of $1,700 was drawn by one of the partners in the partnership name. The firm of Vernon & Co., continued until the 28th of February, 1833, when it was dissolved, and notice of the dissolution published in the newspapers. There was therefore but one original note, though it was followed by several renewals before the dissolution, and the court hold that the bank must be considered as having had dealings with the firm within the meaning of the rule requiring actual notice of the dissolution. That decision was followed

by the Supreme Court of the same State in *National Bank vs. Norton*, 1 Hill 572, where a note was endorsed by a firm and discounted by the bank, and several renewals with deductions followed. In that case the original note was discounted on the 24th of January, 1837, and the firm was dissolved, and notice of dissolution duly published on the 1st of February, 1837, so that the first as well as the subsequent renewals took place after the dissolution. The court held that the note sued on being an attempt to renew an old note of the firm which lay in the bank, and was confessedly binding on the firm, the partners must be considered as dealers with the bank, and that the latter was therefore entitled to actual notice of the dissolution. In *Wardwell vs. Haight*, 2 Barb. 549, two previous transactions, one consisting of a purchase of goods for cash and the other a purchase on credit, which was paid prior to the dissolution, were held sufficient. In *Clapp vs. Rogers*, 2 Kern. 283, two previous very small purchases on credit, one to the amount of $11.03, and the other to $20.40, which had been paid prior to the dissolution, were likewise held sufficient, and the Court of Appeals, by Denio, J., said the rule requiring actual notice "proceeds upon a general presumption that one giving credit to a mercantile firm does so upon the responsibility of the individual partners; and we cannot annex to it a distinction based upon the amount of the credit without destroying that certainty which is essential to its utility." In the subsequent case of *City Bank of Brooklyn vs. McChesney*, 20 N. Y. 240, there was no public notice of the dissolution by publication in the newspapers or otherwise, and what is said by the court in that case, upon the question we are now considering, may well be regarded as a mere *dictum*. Reference has also been made to the cases of *Hutchins vs. Bank of Tennessee, Hutchins vs. Sims, and Hutchins vs. Hudson*, 8 Humph. 418, 423, 426; *Grinnan vs. Baton Rouge Mills Co.*, 7 La. Ann. 638, and *Amidown vs. Osgood*, 24 Vt. 278, in which are to be found decisions or dicta, bearing to some extent upon this question, but we discover nothing in any of them in conflict with the New York decisions we have cited.

The principle, as shown by these authorities, upon which this rule of actual notice is founded, seems to embrace the present case. That principle is that credit already raised on the faith of the partnership is presumed to be continued on the same footing, unless special notice of a change be given; and as every

partner knows, or has the means of knowing, who are the persons with whom his firm has transacted business, and from whom it has received credit, public policy and natural justice alike demand that he should give to every such party personal and special notice of the withdrawal of his responsibility. As was said by the Chancellor in *Vernon vs. Manhatten Co.*, the word "dealing" when used in reference to this rule "is merely used as a general term to convey the idea that the person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership." It may be true, as was most forcibly stated by Senator Verplanck in the same case, that one who merely takes the negotiable paper of a firm from a third hand, and receives payment through a bank, or passes it away to another, cannot be called a dealer with the firm; and it may well be said that it would be to require impossibilities, to insist that the partners of a large commercial house in extensive business should be able to know for years who had been the last holder of their paper, or through whose hands it may have passed, and to send to all of them special notice, as dealers. But the case now before us is not of that character, and no such difficulty arises. The plaintiff received the note of October, 1871, with all the subsequent indorsements then upon it, directly from Rose, one of the partners of this firm, then subsisting, and paid him for it its full face value, thus bringing the plaintiff and the firm into a mutual dealing. It cannot be doubted but that by this transaction a credit was raised upon the faith of the partnership, that the plaintiff gave them credit, and relied upon the united responsibility of the two partners. Porter, the other ostensible and known partner, knew, or had the means of knowing, through whom the money upon this note was raised. The plaintiff dealt in this transaction immediately and directly with the firm, and did not receive the note from a third party, and merely pass it away to another. Nor is there any proof to show that this firm was a great commercial house, engaged in extensive trade, and constantly issuing their negotiable securities, so as to make it difficult for them to know through whose hands their paper may have passed. We are therefore of opinion, this case must be governed by the general rule, and that actual notice of the dissolution should have been given to the plaintiff in order to relieve the defendant, Porter, from responsibility on this check.

It follows there was no error in the rulings upon the prayers contained in the third exception. The evidence offered in the first and second exceptions was also clearly admissible. It was part of the plaintiff's case to offer in evidence the note of October, 1871, not only to show the consideration for the check sued on, but to establish a previous dealing with the firm and to show the circumstances under which he received the note, what he paid for it, and that he, in fact, received it from one of the partners of the firm.

Judgment affirmed with costs.

NOTE.—See Mechem's Elements of Partn., § 262.

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## ASKEW vs. SILMAN.

*Supreme Court of Georgia. 1895.*

95 Ga. 678. 22 S. E. 573.

Error from the city court of Jackson. W. W. Stark, Judge.

Action by Mrs. S. E. Silman against Elbert Askew and others. From a judgment for plaintiff, and an order denying a new trial, defendant Askew brings error. Brought forward from the last term. Code, §§ 4271a–4271c. Reversed.

*W. I. Pike, E. C. Armstead, G. C. Thomas,* and *J. J. Strickland,* for plaintiff in error.

*J. A. B. Mahaffey, E. T. Brown,* and *Erwin, Cobb & Woolley,* for defendant in error.

SIMMONS, C. J. Mrs. Silman sued Askew and others, alleged to be members of the firm of Austin & Co., upon a promissory note signed in the firm name, and dated June 17, 1890. Askew pleaded "Not indebted;" also that he had not signed the note, nor authorized any person to do so for him, and had never ratified the signing; and further, that he was not a member of the firm when the note was signed, and was not bound by the contract; that the firm was dissolved January 11, 1888, and had ceased to do business from that date, which fact was known to the plaintiff when the note was executed. There was a verdict

for the plaintiff against all the defendants sued, and Askew made a motion for a new trial, which was overruled, and he excepted.

1. The main question at issue on the trial of the case was whether there was such notice of the dissolution of the partnership as would relieve Askew from liability for the debt in question. It appeared from the evidence that the dissolution took place, as alleged in the plea, more than two years prior to the date of the note, and that the note was given by Austin, one of the copartners, without the knowledge or consent of Askew, for money borrowed by Austin in the name of the firm at the time the note was executed.

Askew's withdrawal from the partnership was announced soon after the dissolution, in a newspaper published in the town in which the plaintiff resided and the firm conducted its business, the announcement appearing at different times, in the form of news items, written by the editor of the paper. The plaintiff was a subscriber to the newspaper when these notices appeared, but testified that she did not see them, and that she had no notice or knowledge of the dissolution at any time prior to the execution of the note, but supposed, when she took the note, that Askew was still a member of the firm. She had been a customer of the firm, as a purchaser of goods, during Askew's connection with it, but was not a creditor before the date of the note. The court, in certain instructions to the jury, which are complained of by the plaintiff in error, charged them, in effect, that if the plaintiff was a "customer" of the firm, she would be entitled to actual notice of the dissolution. We think the court erred in so charging. In order to relieve an ostensible partner from liability for debts contracted in the partnership name subsequently to his withdrawal from the firm, the dissolution must be made known "to creditors and to the world" (Code, § 1895); but it is not necessary that the notice should be actual or personal except to creditors. Although it is often said in textbooks and decisions that actual notice or knowledge of the dissolution must be brought home to former "customers" of the firm, this language has reference only to creditors. See 2 Bates, Partn. § 613: 17 Am. & Eng. Enc. Law, p. 1124. A customer, in the sense in which the term was used in this case,—that is to say, one whose dealings with the partnership have been confined to the purchase of its goods,— is entitled only to such notice as should be given to "the world."

2–4. As to the notice which should be given to "the world," no inflexible rule can be laid down. Publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made, is usually sufficient notice to the world. *Ewing vs. Trippe*, 73 Ga. 776; T. Pars. Partn. (4th ed.) § 317, and notes. And see *Richards vs. Butler*, 65 Ga. 593; *Ellison vs. Sexton*, 105 N. C 356, 11 S. E. 180. An editorial notice, not signed by any member of the firm, may be as effectual for this purpose as an advertisement purporting to issue by authority of the partners over their signature. *Solomon vs. Kirkwood*, 55 Mich. 256, 21 N. W. 336; *Young vs. Tibbitts*, 32 Wis. 79. Whether this is so or not is generally a question for the jury, and the court in the present case erred in charging, as a matter of law, that such notice would not be sufficient. "It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard,—as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership,—are proper to be considered on the question of notice." *Lovejoy vs. Spafford*, 93 U. S. 430.

It should be left to the jury to say whether the retired partner made a reasonable and *bona fide* effort to acquaint the public with the fact of his retirement, and whether, on the other hand, the creditor, with the means and opportunity afforded him, knew, or ought to have known, of the fact. Even in the absence of any showing that notice of the dissolution was given, the fact that a considerable time elapsed between the dissolution and the contracting of the debt has been deemed sufficient to render the creditor chargeable with notice. Certainly this fact would go far to show that the debt was not or ought not to have been contracted on the credit of a former partner. T. Pars. Partn. (4th ed.) §§ 317, 322. There is some question as to whether the jury may infer notice from general notoriety of the dissolution. See 2 Bates, Partn. § 622, and cases cited. We think, however, that the evidence excluded by the court below in this case, as to the general notoriety of Askew's withdrawal from the partnership, although such notoriety may not of itself have been sufficient to charge the plaintiff with notice

of the fact, ought to have been allowed to go to the jury, to be considered by them for what it is worth, in connection with the other evidence bearing on the question of notice.

5. If the money for which the note was given was borrowed, and the note given without Askew's knowledge or consent, and without subsequent ratification on his part, and if he was not liable on other grounds, the fact that the money was used in paying debts contracted by the firm prior to his withdrawal therefrom would not render him liable; and the court below erred in charging the jury as it did on this subject. Judgment reversed.

NOTE.—See Mechem's Elem. of Partn., §§ 262, 263.

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## DICKINSON vs. DICKINSON.

*Court of Appeals of Virginia, 1874.*

25 Gratt. 321.

Action by Henry Dickinson against Henry J. Dickinson, Stephen Banner and George Banner, late partners under the firm name of H. J. Dickinson & Co., to recover upon a promissory note signed in that name, and dated March 9, 1860. Stephen and George Banner defended on the ground that they did not sign or authorize the note and were not members of the firm of H. J. Dickinson & Co., at the date of the note.

Judgment for defendants and plaintiff appeals.

*Burns*, for appellant.

*Gilmore*, for the appellees.

STAPLES, J. (After stating the facts.)

The main question before us arises upon the plaintiff's first bill of exceptions, and is presented in the sixth assignment of error. This alleged error is in an instruction given to the jury on motion of the defendants. This instruction declares substantially that if the defendants, as early as some day in the month of March, 1859, dissolved, by mutual consent, the partnership previously thereto existing between them, then

neither partner had thereafter authority to create any new obligation, or execute a note therefor in the name of the firm, binding upon the other partners, unless the new obligation was created in the usual course of the partnership business to a person who had no notice or knowledge of the dissolution of the partnership. And if the jury should believe from the evidence, that as early as the spring of 1859 the defendants ceased to buy and sell goods, their storehouse was closed up, H. J. Dickinson, the active partner of the firm, had moved away from the storehouse, and had engaged in another employment; that the storehouse remained closed up until the note in controversy was executed, and was then still closed up; that nothing prior to the execution of the note was done in the business of the partnership after the house was closed, in the spring of 1859, except what was done by the active partner, H. J. Dickinson, in settling up the business, and that all these facts were known to the plaintiff at the time the note in controversy was executed, on the 19th of March, 1860, then these facts are sufficient to charge the plaintiff with knowledge of the dissolution, and the jury should consider him as having such knowledge.

The manifest error in this instruction is in assuming that the facts therein mentioned, if brought home to the plaintiff, were sufficient of themselves to charge him with actual knowledge of the dissolution of the partnership, whether in fact he had or had not such knowledge.

It seems that the defendants did not give notice, public or private, of the dissolution; they did not notify their customers of the fact; they did not even take the trouble to publish or post it at their place of business. At least the instruction does not assume that either of these acts was done by the defendants; but it does assume that, in the absence of each and all of them, certain other acts constituted notice which the plaintiff was not permitted to controvert. Now these facts, as stated in the instruction, may be sufficient to satisfy a jury that the plaintiff was informed of the dissolution of the partnership; but certainly they do not constitute notice; they are not sufficient as a matter of law, to charge the plaintiff with such notice. Each and all of them may have been known to him, and still the plaintiff may not have had such knowledge or information in

regard to the dissolution as would invalidate the note in his possession.

The instruction was therefore a manifest invasion of the province of the jury, and as such was clearly erroneous. The learned counsel insists, however, that no injustice was done the plaintiff, because the question of notice is not involved in the inquiry. His proposition is, that one partner cannot, by a new contract entered into after the dissolution, impose any new obligation upon his copartners without some special authority for that purpose. The note in controversy having been executed after the partnership was dissolved, was not binding upon the partners who did not unite in its execution, although the creditor may have had no notice of such dissolution. The plaintiff could not, therefore, have been prejudiced by anything in the instruction upon the subject of notice, however erroneous it may have been.

If the learned counsel's premises are correct, his conclusion is undoubtedly correct also. But are his premises correct? The only authority he cites to sustain his position is that of *Parker vs. Cousins*, 2 Gratt. (Va.) 372, 44 Am. Dec. 388. That case does, unquestionably, affirm the general proposition that one partner cannot, after the dissolution, create a binding obligation upon the firm without some special authority for that purpose; but this decision was made upon a state of facts which showed that the person dealing with the partner was informed of the dissolution at the time of the renewal of the note.

The principle is well established that, if a partner contracts in the name of the firm with a third person after the partnership is dissolved, but that fact is not made public, or known by such third person, the law considers the contract as being made with the firm and upon their credit. The rule upon this subject is thus laid down in Lindley on Partnership, p. 213: "So if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force; although as between themselves, a dissolution or retirement is a revocation of the authority of each to act for the other. Thus, if a known partner retires (which is in fact a dissolution), and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement

by his late partner, even though the plaintiff had no dealings with the firm before the making of the note. And in determining which was first in point of time, to wit: notice of the dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bears date, unless some reason to the contrary can be shown."

In *Ketcham vs. Clark*, 6 John. (N. Y.) 144, 5 Am. Dec. 197, the draft was accepted in the name of the firm after the dissolution. It was held that both partners were bound by the acceptance, there being no evidence of any public notice of the dissolution of the partnership, nor any special notice of its dissolution to the party dealing with the firm.

It is useless to multiply citations upon the point. The authorities are believed to be almost uniform in support of the proposition. *National Bank vs. Norton*, 1 Hill, (N. Y.) 572; Story on Partnership, secs. 160, 161, 334, 336.

In regard to notice of dissolution, a distinction has been justly made between persons who have had previous dealings with the firm, and those who have had no such dealings. As to the former, it has been universally held that actual notice is indispensable. It must not be inferred, however, that special notice must be given to each customer. If actual knowledge of the dissolution is brought home to the party, he will be concluded, although no notice whatever may have been given. Whether in such case the evidence is sufficient to justify the inference of actual knowledge, is a question of fact for the consideration of a jury, under the supervision of the court. *Irby vs. Vining*, 2 McCord, (S. Car.) 379; *Coddington vs. Hunt*, 6 Hill, (N. Y.) 595; Collyer on Partnership, sec. 332.

It may be proper to add, that these rules apply only to cases where the dissolution is by act of the parties. It is well settled that, upon the death or bankruptcy of a partner, notice of the dissolution to third persons is not necessary. The reason seems to be, that in those cases the dissolution is by operation of law. It would be the height of injustice to allow the acts of the other partners to bind the estates of persons who are incapable of acting themselves, or of continuing an authority for that purpose.

It follows, from what has been said, that the circuit court

erred in giving the instruction set out in the plaintiff's first bill of exceptions. This view renders it unnecessary to consider particularly the instruction asked for by the plaintiff and refused by the court, which is set out in the second bill of exceptions. * * *

For the error already mentioned, the judgment of the circuit court must be reversed, and the cause remanded to be proceeded with in accordance with the views herein announced.

Judgment reversed.

NOTE: See Mechem's Elem. of Partn., §§ 259, 271, 272.

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## MILMO NATIONAL BANK vs. BERGSTROM.

*Court of Civil Appeals of Texas, 1892.*

1 Tex. Civ. App. 151, 20 S. W. Rep. 886.

This suit was brought by appellant against A. N. Carter and Louis Bergstrom, as partners under the firm name and style of A. N. Carter, seeking to recover judgment for the sum of $5,216.91 on account of moneys loaned and advanced to said firm. Appellee Bergstrom denied the partnership, and that he was indebted to appellant. Judgment below was rendered in favor of appellant against Carter, and that it take nothing against appellee Bergstrom. From this judgment, appellant prosecutes this appeal.

The evidence shows that Carter and Bergstrom, in September, 1881, entered into a copartnership for one year for the purpose of dealing in hides, wool, and produce. In October, 1881, the account sued on was opened with appellant by Carter, for the purpose of obtaining advances to be used in carrying on the business of the firm. Carter was the business manager of the firm at Laredo, and continued to obtain money from the bank until in the spring of 1883, when the account sued on was closed. It appears from the evidence that, at the time the account with appellant was opened, Carter informed the officers of the appellant bank that Bergstrom was a partner in the firm of A. N. Carter, and upon the faith of this

information the advances were made. It was contended by appellant that, at the beginning of the dealings between it and Carter, Bergstrom was actually a partner with Carter, and that credit was extended upon the faith that he was such partner, and, although he may have ceased to be a partner after September, 1882,—the time when the contract of partnership terminated,—he is liable to appellant because it had no notice of the dissolution, or of the contract of partnership, until after the account was closed, in 1883. Upon the other hand, it was contended by Bergstrom that although he was a partner for one year from September, 1881, at that time the firm was dissolved, and that he is not bound by the statements made by Carter during the year that he, Bergstrom, was a partner; that he was a secret or dormant partner of the firm, and, being such, he was not required to give notice of his dissolution with the firm and is not bound or liable to appellant. The seventh paragraph of the charge of the court is as follows: "If, however, you believe from the evidence that said firm of A. N. Carter ceased to exist on the 23d day of September, 1882, and that plaintiff had no knowledge, directly or indirectly, that Louis Bergstrom continued as a partner of said firm of A. N. Carter, and if you believe, further, from the evidence, that said Bergstrom did no act, directly or indirectly, to lead plaintiff or his agents to believe that said firm of A. N. Carter was continued, and that the plaintiff had his dealings with A. N. Carter in his individual capacity, then and in that event the defendant Bergstrom is not liable for any dealings had between the plaintiff and the said A. N. Carter so made with said Carter in his individual capacity." This charge is assigned as error.

*J. O. Nicholson* and *S. M. Ellis*, for appellant.

*Upson & Bergstrom*, for appellees.

FISHER, C. J. (After stating the facts.) When credit is extended to a firm upon the assumption that certain persons comprise the membership, and such assumption in point of fact is correct, the members of such firm are liable to the creditors for future dealings with the firm until notice of dissolution is given to the creditor. Under such state of facts the creditors will not be affected by a dissolution or change in the firm until notice be given or knowledge of such fact has been

brought home to them, and the burden of proving such notice or knowledge rests upon the partner claiming such exemption. 17 Amer. & Eng. Enc. Law, 1117, 1118; 2 Bates, Partn. §§ 611-613. This rule of law does not apply to partners who are regarded in law as dormant or secret partners, for no credit is extended upon the faith of their membership, and they, in retiring from the firm, are not required to give notice of such fact. The uncontradicted evidence in the record is that Carter notified the appellant, at the time that the account was opened, that Bergstrom was a partner of the firm. Such in fact was his relationship to the firm at that time. We think this information given to appellant is sufficient to make Bergstrom known to appellant as a member of the firm, and as to appellant he cannot claim that he was a dormant partner. If it be true that Bergstrom was a member of the firm at the time appellant received information of that fact, it makes no difference from what source received, the effect is to make his connection with the firm known to appellant, and, as to it, he cannot claim that he is a dormant partner. 1 Bates, Partn. §§ 151, 153; 2 Bates, Partn. §§ 608-623; 17 Amer. & Eng. Enc. Law, 1119-1123. Under these rules of law it was error to give the charge complained of, and for this reason we reverse and remand the case. * * *

NOTE: See Mechem's Elem. of Partn., § 265.

## SCARF vs. JARDINE.

*House of Lords, 1882.*

L. R. 7 App. Cas. 345.

The facts sufficiently appear in the opinion.

LORD BLACKBURN: This was an action against Scarf to recover the price of goods sold and delivered. It is admitted that on the 30th of January, 1878, the goods were ordered from the plaintiff Jardine by Rogers, he sending the order in the name of the firm of W. H. Rogers & Co., which was the name under which he and Scarf had traded, and under which name they had dealt with the plaintiff; that the plaintiff well knew that he and Scarf had been the persons so trading; that those goods thus ordered upon the 30th of January were afterward supplied, part upon the 1st of February, part upon the 16th and part upon the 20th. One question of fact was, when had the plaintiff, Jardine, notice of what was the fact, namely that Scarf had ceased to be a partner, and that at the time when the goods were ordered and at the time when the goods were supplied the firm of Rogers & Co., consisted not of Rogers and Scarf but of Rogers and Beech, who had not been formerly a partner but had come into partnership with Rogers afterward, and not till Scarf had retired? Now on that, I understand, the question went to the jury.

The fact was plain that on the 5th of February, 1878, this notice was printed in the *Gazette:* "Notice is hereby given that the partnership heretofore subsisting between us, the undersigned Benjamin Scarf and William Henry Rogers, carrying on business as merchants at 32 Church street, Manchester, under the firm name of W. H. Rogers & Co., was dissolved by mutual consent on the 27th day of July last. All debts owing to or by the said firm will be received and paid by the said W. H. Rogers alone, who will continue to carry on the business as heretofore, in partnership with the undersigned James Beech, under the firm of W. H. Rogers & Co." If Mr. Jardine, the plaintiff, had not been a person who had dealt with the

former firm, the notice in the *Gazette* would have given him notice as from that 5th of February which was after the order had been given upon the 30th of January. The goods were delivered at different times, as I have stated, substantially after the 5th of February; and it was material to ascertain when it was that Mr. Jardine got actual notice. As soon as he was aware of this notice being published in the *Gazette* it is quite plain that he would know that the authority which had originally belonged to Rogers to bind himself and Scarf had been revoked. But he was not bound to read the *Gazette;* and in point of fact it appears, according to the finding of the jury, that he did not read it; and it was not until the 25th of February that he received a circular, at the bottom of which was appended the *Gazette* notice, and which circular was in these terms: "Sir, I beg to call your attention to the annexed notice of dissolution of partnership lately existing between Mr. Benjamin Scarf and myself, and I have the pleasure to inform you that Mr. James Beech has joined me in the business, and will take an active part. The style of the firm will not be altered. Undernoted are the signature of each partner. Yours truly, W. H. Rogers;" then the signatures were given, and below that was a copy of the notice which had been previously published in the *Gazette.* The finding of the jury was that this notice came to Mr. Jardine on the 25th of February, and not sooner.

Now that being the case, the question then arose, what defense, if any, was proved. It was agreed that this should be determined by the Court without asking any further question of the jury, but taking the evidence and drawing the inferences of fact, whether there was a defense or not. On that Denman J. who tried the case thought (it was apparently put to him in that way) that the question was whether or not there was novation; which the Lord Chancellor had just said (and I quite agree with him) is another word for accord and satisfaction by giving in substitution the liability of another person upon another contract in lieu of the contract for which the former partners were liable; and Denman J. thought that there had been a novation proved.

When the case came before the Court of Appeal the majority of the Court of Appeal (Baggallay L. J. seems to have doubted about it) thought that the novation in that sense was not proved. I do not feel quite certain whether if I knew all the evidence

(for it has not been brought fully before us)—if I thought the question was whether there was novation or not—I should have agreed with them that on the evidence brought before us it was not in this case proved. I need not, however, enter into the question how that was; because my opinion, which leads me to concur in the judgment which has just been moved, is that that was not the real question—that there was a mistake and a misapprehension on the part not only of the counsel who argued it, but of the Judges who heard the case, when they thought that the question was that of novation, the defense really depending upon a prior question.

Though the amount now in dispute is very small, the question is an important one. I do not think there can be any doubt (it is a very old law indeed) that where a person has given authority to another (it is not peculiar to partnership), the authority being such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation. In this case I think there can be no doubt that Rogers having been partner with Scarf had authority, and apparently continuing authority, to bind Scarf as to all matters concerning the partnership, and that Mr. Jardine being an old customer had a right to believe that that authority continued until he was told that it was revoked. But then I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground, as has been very well put and explained in *Freeman vs. Cooke*, 2 Ex. 654, that there is a duty upon the person who has given that authority if he revoke it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued; and the failure to give that notice precludes him from denying that he gave the authority against those who acted upon the faith that that authority continued. I put rather an emphasis upon those last words "against those who acted upon the faith that that authority continued," for I think that no man has a right to say "I know now that the authority was in fact revoked, but I will continue to go on, and will do things subsequently, and act upon the supposition that I hold this person liable, though I am not actually acting upon the faith that he has given authority, but I am acting upon the ground that I find another is really liable, and I will only come on him

if that other does not pay." I do not think he can do that. The question therefore is this, was Mr. Jardine acting upon the faith that it was so?

Now Mr. Jardine upon the 30th of January, as far as appears upon the evidence, had never so much as heard of Mr. Beech. Mr. Jardine when he received the order from W. H. Rogers & Co., had every reason to think he was contracting to supply these goods to Rogers and Scarf, and he did supply the substantial part of the goods on the 1st, 16th and 20th of February, before he had any notice that he was not supplying them to Rogers and Scarf. Therefore clearly at that time he was in the case of a person who had acted upon the faith that W. H. Rogers' authority when he gave the order still continued when he supplied the goods; and he therefore certainly had a right to hold Scarf liable on that ground. But it is quite clear from the notice, and the circular which I have already read, that on the 25th of February he became aware that though Rogers had apparent authority, and though he having acted upon that apparent authority had a right, if he pleased, to hold Scarf liable, yet in point of fact Scarf was not really a principle and had not given real authority; that in point of fact Rogers was not acting by Scarf's authority but by Beech's authority, and that Rogers and Beech were the real persons who had ordered the goods and who had received them, and were the persons who were therefore liable; because in fact Rogers had authority from Beech and had not in fact authority from Scarf.

The first question therefore which arises is, could a person who knew that he held both Beech and Rogers liable, and had very rightly the power to say "I will treat this as being a joint liability of Rogers and Beech," say "I will treat it not only as the joint liability of Rogers and Beech, but as the joint liability of Rogers, Beech and Scarf," treating them all three as jointly liable? And certainly, though counsel could not produce any precise authority upon the point, I should myself, unless I had seen what the Judges of appeal had here said, never have entertained the slightest doubt that he could not. I should not myself have entertained a doubt that in old times a plea in abatement, in an action against Rogers and Beech for not joining Scarf, would have been bad; nor could I have doubted that in old times if an action had been brought against Rogers, Scarf and Beech jointly there would have been a nonsuit

entered, upon the ground that there was a variance in the proof—that there was no proof that the three were liable. I say, I should not have doubted that at all if I had not found (unless there has been some misprint, or some inaccuracy in the shorthand note) that that was not the view of the Court of Appeal. Lord Coleridge is reported to have said, "The three partners are all primarily liable clearly." I think that at the moment when he said that he could not have had the facts before him. The three never were partners at all—I cannot see how he could possibly say that that was the case if he remembered the facts. Brett L. J. does not say that in terms, but he does say what almost involves the same thing. When he treats it as a novation he says "I cannot infer from the fact of his making a claim against people with respect to whom he had a valid claim" (by that he means Rogers and Beech) "that he had given up his claim against another person who was liable to him." Now I do not think that that other person (Scarf) was as I have said before, liable to Jardine. Scarf was precluded or estopped from denying that he had given the authority which would have made him liable, if the fact had been so, but I do not think that it was so: and I agree with what the Lord Chencellor has said, that the difference is an important one.

There seems not only to be no distinct authority upon the subject, but there really seems to have been a doubt in the minds of these able Judges (at least it is quite clear that they do not seem to have perceived the point clearly) whether or no the plaintiff could consider all three persons jointly liable. I think it important to say distinctly that in my opinion he could not, and to say that the right which the plaintiff had when he got the notice on the 25th of February was to sue either at his option, but he was not bound to sue Scarf. He might very reasonably and properly say, "I think that I have a legal right to hold Mr. Scarf liable because he did not give notice to me in time; but I am not going to do so. I find now that I have a right to hold Rogers and Beech liable and will do so;" and if he had communicated that to the parties, there could be no doubt at all that when he had elected thus to charge Rogers and Beech and Rogers and Beech only, there would have been no question whatever that it was a final and conclusive election and that he could in no way after that charge Scarf. But he

had also a right if he pleased to say, "I will proceed upon the ground that Scarf has made himself liable to me. I will hold Scarf liable." But in that case I think he could not hold Beech also liable. It seems to me that he had his choice between the two; he had his choice whether he would hold Rogers and Beech liable as in fact they were, or Rogers and Scarf liable as he had supposed they were, though Scarf was not liable in fact; but he could not hold both sets of persons liable. And then comes the question which ought to have been decided, not whether there was a novation (upon which probably if I had thought that that was the question I should have agreed with the majority of the Court of Appeal), but whether the plaintiff had before the 30th of September, the date at which he for the first time made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable.

Now on that question there are a great many cases; they are collected in the notes to Dumpor's Case, 1 Sm. L. C. 8th ed. 47, 54, and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. "*Quod semel placuit in electionibus, amplius, displicere non potest.*" That is Coke upon Littleton (146a), and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made.

But upon that comes the question which is the one that now arises, whether there was evidence here on which your Lordships should find as a fact that there was an election. In *Clough vs. London and Northwestern Railway Co.*, L. R. 7 Ex. 34, the Exchequer Chamber had to consider that question a good deal in a case of some importance in which the judgment was carefully considered. I wrote it myself and I say nothing further about it than this, that it had the full assent of all the other Judges. The result of what is there said is that where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons,

and accordingly in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final.

I may also refer to the case of *Jones vs. Carter*, 15 M. & W. 718, as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. In *Jones vs. Carter*, 15 M. & W. 718 (the principle is general, though the particular application is peculiar) the question was whether a man, who had a right to avoid a lease, had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which, in modern times, you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the court held that it must be taken as if the plaintiff had entered, and that inasmuch as the entry to avoid a lease was unequivocal in its nature he could not afterwards say, "The lease was not void."

Now that is the question which I think the court below ought to have decided, and which I think your Lordships now, having power to find all the facts, have to decide upon the evidence. Was there before the 30th of September, which was the date when plaintiff first came upon Scarf, an unequivocal election to take Beech as his debtor? I do not think that at first there was. I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after the 25th of February, when he had full notice (entering them in one account), would

preclude him; because I think as I said before, that it was merely an expression of his own private intention and opinion, which did not bind the matter until it was communicated to the other side, which it never was. I do not think that his having demanded money from Rogers after he knew that Rogers was carrying on the new firm of Rogers & Beech will do, for the reasons given by Brett L. J., that the notice of dissolution distinctly said, "Whatever Rogers & Scarf owe, go to Rogers, and Rogers will pay it." But then the evidence goes further. I am not sure that taking a check from Rogers & Beech as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's check or otherwise as he pleased. But then the plaintiff goes on and issues a writ against Rogers & Beech—he sues Beech. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beech I cannot imagine. The result of his issuing the writ was that Rogers & Beech, not being able to get time to obtain terms, went into liquidation, and then the plaintiff sent in his affidavit, claiming to prove against Rogers & Beech for this sum which is now in dispute, and also for the subsequent debts, treating them all as one. I think that also is an unequivocal act. And taking the whole together I can bring myself in no way to doubt that upon the facts we ought to find that Mr. Jardine, having the right of election between holding Beech liable and holding Scarf liable, had, before he ever came upon Scarf, finally determined his election and taken Beech as liable, and that he could not hold both Scarf and Beech liable.

I am consequently of opinion that the judgment should be for the defendant, though not upon the ground on which it was originally put, namely, that there was a novation, but upon the ground that Scarf was never liable, for this reason, that before any step was taken to make him liable a final and conclusive election had been made to hold Beech liable, which involved impliedly that Scarf was not.

SELBORNE, L. C., WATSON and BRAMWELL, LL. JJ., delivered concurring opinions.

NOTE.—See Mechem's Elements of Partn., § 262.

## THAYER vs. GOSS, *et al.*

*Supreme Court of Wisconsin, 1895.*

91 Wis. 90, 64 N. W. 313.

Appeal from circuit court, Pierce county; E. B. Bundy, Judge.

Action by Lottie Thayer against Alfred J. Goss and J. B. Goss on a note executed to plaintiff by J. B. Goss & Co. From a judgment for plaintiff, defendant Alfred J. Goss appeals. Affirmed.

This action was brought against Alfred J. Goss and J. B. Goss, as copartners under the firm name of J. B. Goss & Co., upon a promissory note signed by that name, dated April 19, 1893, payable on demand to the plaintiff, with interest, etc., charging, in substance, that the defendant J. B. Goss was the ostensible and active managing member of a firm doing a milling business at River Falls, Wis., and that the said firm was composed of the said J. B. Goss and Alfred J. Goss; that the plaintiff believed, when she took the said note, that the consideration for it was money loaned to the former firm of J. D. Putnam & Co., consisting of J. D. Putnam and the defendant Alfred J. Goss, which firm was dissolved November 3, 1891, when the firm of J. B. Goss & Co., was formed, and the property and effects of the former firm were transferred to it, and it assumed and agreed to pay the debts of said former firm; that the plaintiff, at the request of the said J. B. Goss & Co., surrendered the note of J. D. Putnam & Co., for said loan, and, relying on the promise and credit of the said firm of J. B. Goss & Co., took the note sued on in lieu thereof. The defendant J. B. Goss made default, and the defendant Alfred J. Goss answered, admitting the allegations in respect to the existence and dissolution of the firm of J. D. Putnam & Co., but denying that any firm or partnership of J. B. Goss & Co., was formed, or that he was ever a member of any such firm, or that the property and effects of the firm of J. D. Putnam & Co., were ever transferred to the firm of J. B. Goss & Co., or that it assumed or agreed to pay the debts of the former firm; and

he alleged that the business carried on under the name of J. B. Goss & Co., was the private business of the said J. B. Goss, in which he, defendant Alfred J. Goss, had no interest.

At the trial by the court it was found, among other things: (1) That prior to November 5, 1891, the defendant Alfred J. Goss and J. D. Putnam were doing a milling business together as copartners under the firm name of J. D. Putnam & Co.

(2) That on that day the partnership was dissolved, and the said Putnam and the defendant Alfred J. Goss signed and caused to be published, at the place of said business, a notice as follows, to wit: "Notice of Dissolution. Notice is hereby given that the copartnership formerly existing between the undersigned, J. D. Putnam and Alfred J. Goss, under the firm name of J. D. Putnam & Co., is this day dissolved by mutual consent, and the business will in the future be carried on under the firm name of J. B. Goss & Co., who will settle all claims of the late partnership. J. D. Putnam. Alfred J. Goss. November 3rd, 1891."

(3) That it was then understood that the partnership property should be conveyed to the defendant J. B. Goss, and that he should carry on the said business, and pay the debts of the firm of J. D. Putnam & Co., doing business under the name of J. B. Goss & Co.; but by mistake the property was conveyed to the defendant Alfred J. Goss, who pursuant to said agreement, afterwards conveyed it to the defendant J. B. Goss, and he carried on the business under the name of J. B. Goss & Co., having no partner. That there was in fact no partnership existing between the defendants, and Alfred J. Goss had no interests in the profits of the business of J. B. Goss & Co., as partner.

(4) That the note sued on was executed in the manner and for the consideration set forth in the complaint, and the plaintiff, when she took the same, understood and believed that J. B. Goss & Co., was a firm consisting of J. B. Goss and Alfred J. Goss, and that there was such a holding out by the said Alfred J. Goss as to induce her to so believe, and to act upon such belief.

As a conclusion of law the court held that the plaintiff was entitled to judgment against both defendants for the amount of the note and costs. Aside from the proof of the signing and

publishing of the notice as before stated, it appeared in evidence that the plaintiff saw the published notice in the *River Falls Journal*, and she testified that she believed that the defendant Alfred J. Goss still continued in the business, but she had never heard any one say so; that she believed that J. B. Goss and Alfred J. Goss continued the busines. From the judgment on such finding the defendant Alfred J. Goss appealed.

*Spooner, Sanborn, Kerr & Spooner*, for appellant.

*F. M. White*, for respondent.

PINNEY, J., (after stating the facts). The familiar and well-settled rule is that a dissolution of the copartnership by act of the parties, whether a complete discontinuance of the concern or the retirement of a single partner or addition of a member, does not affect the outside world, unless proper notice is given; that actual notice must be brought home to former customers, or those who are creditors by having dealt with it, but notice by publication is sufficient as to all others. Bates, Partn. § 606; 1 Lindl. Partn. *221. The plaintiff must be regarded as a former customer or dealer with the firm of J. D. Putnam & Co., and, as such, entitled to actual notice, she having loaned them money, though but in a single instance, for which she was then their creditor. She comes within the reason of the rule. Bates, Partn. § 613; *Bank vs. Howard*, 35 N. Y. 500; *Lyon vs. Johnson*, 28 Conn. 1; *Wardwell vs. Haight*, 2 Barb. 549; *Vernon vs. Manhattan Co.*, 22 Wend. 182; *Bank vs. Norton*, 1 Hill, 572.

The ground upon which notice of the discontinuance of the concern by act of the parties or the retirement or addition of a member is required is stated as arising from a species of estoppel to deny the continuance of the agency of each of the partners for the firm, or on the ground of negligence whereby credit is given, or from a presumption of a continuance of the former relations, giving to one who once knows of the existence of a firm the right to assume that it remains the same, so that, until proper notice of dissolution, a partner's attitude is like that of a partner by holding out. Bates, Partn. § 607; *Vernon vs. Manhattan Co.*, 22 Wend. 189, 193. In *Scarf vs. Jardine*, 7 App. Cas. 345, it is stated that the principle upon which those who have dealt with the firm before a change took place are entitled

to assume, until they have notice to the contrary, that no change has occurred, "is that of the estoppel of a person who has accredited another, as his known agent, from denying that agency at a subsequent time, as against the persons to whom he has accredited him, by reason of any secret revocation,"—in partnership, there being an agency by which one partner is the agent of the firm for the time being to carry on the partnership according to the usual course. 1 Lindl. Partn. 40; *Thompson vs. Bank*, 111 U. S. 529, 541, 4 Sup. Ct. 689.

The plaintiff saw the published notice, and about 18 months afterwards she took the note upon which she sues in lieu of the J. D. Putnam & Co. note, and the question is whether the published notice, and the manner in which the new note was executed, can be fairly held to constitute notice to the plaintiff that the defendant Alfred J. Goss had ceased to be a partner in the concern. If the change in the name was such as to indicate that he was no longer a member, there would certainly be no ground for holding him liable. In the firm name of J. D. Putnam & Co., Alfred J. Goss was mentioned under the ambiguous and uncertain designation "& Co." The notice affirms that the partnership of J. D. Putnam & Co. is dissolved, and that the "business will, in future, be carried on under the firm name of J. B. Goss & Co.," who are to settle all claims of the late copartnership. It is fairly evident that a new member, J. B. Goss, has been introduced into the business, and it may fairly be inferred that Putnam had retired. Now, what business was it that in future would be carried on under the new firm name? Plainly, the business of the former firm. Here is no intimation that Alfred J. Goss has retired. On the contrary, the fair implication is that he remains under the designation "& Co.," as was the case in the name and style of J. D. Putnam & Co.

Beyond the fact of the dissolution of the former copartnership, that the business would in future be carried on under the firm name of J. B. Goss & Co., and that they would settle all claims of the late copartnership, the notice wholly fails to convey any direct information; but, as observed, we think it may be fairly inferred that Putnam had withdrawn and that Alfred J. Goss remained in the business; that the change was substantially a reorganization by the withdrawal of a firm member and by taking in a new one. There is no intimation that Alfred

J. Goss had sold out his interest, or that he had no interest in or was not a member of, the alleged firm of J. B. Goss & Co. The proposition is laid down that when the change of name is relied on it "must indicate the retirement of the particular partner sought to be held, for otherwise, though it be a dissolution of the identical partnership, it is also notice of a new one, in which all the former members may be presumed to continue." Bates, Partn. § 623. We regard this rule as eminently practical and just, and it has the sanction of high authority.

In *Howe vs. Thayer*, 17 Pick. 91, there was, in effect, a dissolution, and the organization of another firm with a different name. The retiring partner, Thayer, was held liable to the former dealers, because the change of name did not indicate that he was the partner going out; and SHAW, C. J., said: "When a business is carried on by three or more as partners, and one withdraws, or one is added, or both, and notice thereof given, and the business is carried on as before, those as to whom no notice is given must be presumed to hold the same relation to the concern that they did before; and such a change furnished no presumption that the others have ceased to be partners. If the plaintiff knew that Colton had withdrawn, and ceased to be a partner, it was not, in law, a notice to the plaintiff of the dissolution of the partnership, as to all its members, to the effect contended for, and to the purpose for which that proposition was advanced, namely, to exempt the other members from liability. Or if it was, in a certain sense, evidence and notice of the dissolution of the same identical partnership that existed before, it was at the same time evidence and notice of the formation of a new partnership among all the remaining members of the firm to carry on the same business, holding the same relation to its customers and the public, with the single exception implied from the fact that the retiring member will be no longer liable for new contracts, and that the acceding partner will thenceforward become liable."

But it is insisted that the new note was not given by the firm with which the plaintiff had been connected; that that firm had been dissolved, and that there never was in fact any such firm as J. B. Goss & Co. But this contention is met and answered in the case of *American Thread Co. vs. Wortendyke*, 24 N. Y. 550, in which the rule laid down in *Howe vs. Thayer*, *supra*, is cited and approved. In that case DENIO, J., says that: "In every case

where a partner has withdrawn, and there is a further dealing with the remaining partners under such circumstances as to leave the retiring partner responsible, the contract is not between the creditor and the former firm, but it is with a new firm, which the creditor has been led to believe still embraced the partner who has in fact gone out. The bare fact, therefore, of the dissolution of the old firm and the creation of a new one, with which the credit sought to be enforced was had, and which did not embrace one of the old partners, is not conclusive against the plaintiff."

In the present case the notice was to the effect that "the business will in future be carried on under the firm name of J. B. Goss & Co.," who will settle all claims of the late partnership, and it is said that no such firm was created; but whether so or not, the signature to the new note, as well as the notice, gives rise to the just inference, we think, that Alfred J. Goss continued in the business under the new name, and, if there was no new firm formed in fact, it is difficult to see how he can claim to be exonerated from liability. In the case of *Thread Co. vs. Wortendyke, supra*, the firm with which the plaintiff had dealt was "Wortendyke Brothers." Subsequently the firm was dissolved, and one of the brothers retired. and a new firm was formed, another brother becoming, with the others, members of the new firm under the firm name of "Wortendyke Brothers & Company"; and a note was given to the plaintiff, a former dealer, in the latter name, for goods sold after the dissolution. The plaintiff having had no actual notice of the dissolution, it was held that the retiring member was liable on the note, notwithstanding the change in the firm name, and that the plaintiff had a right to assume that the former partners remained in the business; that a change of firm name, in order to exonerate a retiring partner, must show that he had withdrawn from the business, and that a change not indicating this is insufficient to put dealers on inquiry.

It must be held, we think, that the notice in this case was an assurance or holding out to the plaintiff and former dealers that the business would be carried on under the new name of J. B. Goss & Co. Alfred J. Goss had been described in the firm name of J. D. Putnam & Co. as the company, and the fact that the name of J. B. Goss took the place of that of J. D. Putnam was no notice of the withdrawal of Alfred J. Goss, but, upon

the principles already stated, was equivalent to a holding out that he still remained in the business, and as a member of the firm of J. B. Goss & Co., designated therein in like manner as in the case of the firm of J. D. Putnam & Co., whether any such firm existed or not; so that he is liable on the note in suit, signed in the name of J. B. Goss & Co., as by holding out and by estoppel. We think that the judgment of the circuit court is correct.

The judgment of the circuit court is affirmed.

NOTE.—See Mechem's Elem. of Partn. §§ 258–266.

# XIII.

## OF THE CONSEQUENCES OF DISSOLUTION.

(See also the cases in Subd. XII, *ante;* also *Shattuck vs. Chandler*, *ante*, p. 368; *Hess vs. Lowrey*, p. 400; *Shanks vs. Klein*, p. 211.)

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### HAWKINS vs. CAPRON.

*Supreme Court of Rhode Island, 1892.*

17 R. I. 679, 24 Atl. Rep. 466.

Defendants petition for a new trial.

This was an action of trover brought by the plaintiff, who was sole surviving partner of a copartnership known as James A. Capron & Co., against the defendant for the conversion, after Capron's death, of certain personalty of the firm. The defendant was executrix and sole legatee of Capron. This action was brought in the court of common pleas, and the jury returned a verdict for the plaintiff, whereupon the defendant filed this petition, alleging that the presiding justice erred in his instructions to the jury.

*Stephen A. Cooke, Jun.*, and *Louis L. Angell*, for plaintiff.

*Samuel W. K. Allen*, for defendant.

PER CURIAM. Whether the relation between copartners with reference to their ownership of the partnership assets is more analogous to a tenancy in common or to a joint tenancy, we need not decide. In either case, a sole surviving partner is entitled at law to the possession of the assets of the firm until its affairs are settled, as well against the representatives of the deceased to whom he is ultimately liable to account, as against strangers. 17 Amer & Eng. Encyc. of Law, 1161; Parsons on Partnership, 458, 2 Lawson, Rights, Remedies, and Practice,

1256. Trover is a proper remedy for a refusal of such possession. The court properly construed the articles of agreement in question, and instructed the jury to consider them as a whole in deciding the question of fraud.

The cause of action in this case, the conversion of the goods occurred after the death of the late partner. It was an injury to the right of possession of the plaintiff, not to the joint possession of the plaintiff and his late copartner. Hence the plaintiff properly sued in his own name. *Smith v. Barrow*, 2 Term Rep. 476, 478. The amendment allowed him to add to his name the words "surviving partner," etc., which were an unnecessary but harmless description of the way he claimed to have acquired title to the goods. * * *

The motion for a new trial must be denied and dismissed.

NOTE: See Mechem's Elem. of Partn., § 268.

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## VALENTINE vs. WYSOR.

*Supreme Court of Indiana, 1890.*

128 Ind. 47, 28 N. E. Rep. 1076, 7 L. R. A. 788.

This suit was instituted by Emily E. Valentine, Martha M. Little, Parmelia R. Gilbert, Mary E. Wood, and Florence T. Horne, the children and heirs at law of John Jack, late of Delaware county, deceased, against Jacob H. Wysor. John Jack, father of the plaintiffs below, died testate in the month of October, 1859. At and before that date, he was in partnership with the defendant, Jacob H. Wysor, the two composing the firm of Wysor & Jack. The testator was also a member of the firm of Wysor, Jack & Kline, which was composed of the above-named Jacob H. Wysor, John Jack, and William B. Kline. This last-named firm was engaged in the milling business, and owned a flouring-mill, together with 65 acres of land adjacent; each member being the owner of an undivided one-third of the business and property. The business of the firm of Wysor, Jack & Kline was in no way connected with that of Wysor & Jack; the last-named firm being the owner of 380 acres of land, which constituted part of the firm assets, in which each

partner had an equal interest. The character of the business of Wysor & Jack does not distinctly appear, but the land owned by them is treated by both parties as partnership property. By the first, second, and third clauses of his will, the testator appointed executors to carry the will into execution, made provision for his wife by giving her a life-estate in his real estate, and expressed a desire that she should be admitted into the firm, and continue the business as a partner with Wysor and Kline, his former associates in the milling business. The fourth and fifth clauses of his will read as follows: "(4) I will and direct that my said executors, and, in case of the death or failure to serve of either, the survivor of them, shall adjust, settle, and compromise any and all debts, claims, or demands due to or from me according to the best of their or his judgment, without any further authority from any court or jurisdiction whatever; and, further, that they shall make settlement with my said partners, and each of them, of the partnership affairs, and of the profits heretofore arising therefrom, together with any matters of dealing between myself and them, or either of them, in manner according to his or their judgment, without any further authority from any court whatever. (5) I do further will and direct that my said executors, or, in case of the failure, from any cause, of either to serve, then the remaining executor, shall sell and convey so much of my personal or real estate, at either public or private sale, with or without appraisement, on such terms, at such place, and in such manner, as to him or them shall seem best, as may be necessary to pay and satisfy all my just debts, reserving, however, to my said wife the title and possession of the house and grounds where I now live; otherwise, selling such parcels, the sale of which will least injure the remainder." As to the remainder of his property, after the termination of the life-estate of the widow, the testator died intestate. After the testator died, Wysor, as surviving partner of the firm of Wysor & Jack, and Wysor & Kline, as surviving partners of Wysor, Jack & Kline. continued in possession of the property of their respective firms until June 25, 1866, when the executors of the last will of John Jack, assuming to act under the provisions of the fourth and fifth clauses of the will, above set out, made a settlement, and entered into an agreement with the defendant, Wysor, whereby, in consideration that the latter agreed to pay the in-

debtedness of the firm of Wysor & Jack, and certain debts due from the testator to Wysor, and also to pay his share of all the unpaid indebtedness of Wysor, Jack & Kline, and all other indebtedness of the testator, including the cost of administration, and, in addition, convey certain property to the widow, and secure to her one-third interest in the property of Wysor, Jack & Kline, free from any debts, the executors and widow agreed to convey to the defendant, Wysor, all the interest of the testator, excepting certain designated parcels, in the real estate owned by the firm of Wysor & Jack. This agreement was consummated, and conveyances were made, accordingly, by the widow and executors, in June, 1866; and it is charged that the defendant claims, in virtue of these conveyances, to be the sole owner of the property, and denies the title of the plaintiffs. These conveyances stood without question until in February, 1880, when this suit was instituted.

Defendant obtained judgment. Plaintiffs appeal.

*O. T. Boaz*, *W. W. Herod* and *F. Winter*, for appellants.

*William Brotherton* and *C. E. Shipley*, for appellee.

MITCHELL, J. (After stating the facts.) It does not appear from the complaint that there was any disparity between the value of the property conveyed and the amount of debts assumed, or that the debts have not been paid according to the agreement, or that there was any fraud or collusion between the surviving partner and the executors, or that the latter were in any way overreached. It is claimed, however, that the power of sale contained in the will did not extend to the partnership real estate, except that specifically mentioned therein; that, if it did, it only authorized the executors to sell the testator's interest in so much thereof as remained after full payment of the partnership debts. Moreover, it is claimed that, even if the executors had authority to sell, the transaction, as disclosed by the complaint, was not a sale, within the meaning of the language employed in the will, and that because the sale was made by the executors without having given notice of the time, place, and terms of sale, and without having included the value of the real estate in the bond given by them when they qualified, the conveyance was invalid and void. It is claimed, too, that Wysor, being the surviving partner of the firm of Wysor & Jack, was a trustee

of the partnership property, under a duty to the heirs and creditors, and that he was therefore incompetent to purchase and receive a conveyance from the executors. For all these reasons, it is urged that the conveyance is illegal, and ought to be set aside, and that an accounting of the affairs of the firm of Wysor & Jack should be had; the appellants alleging their readiness to pay whatever may be found due the defendant, Wysor.

While it is undoubtedly true, as a general rule, that an action to compel a surviving partner to account can only be maintained by the personal representative of the deceased partner, yet circumstances may appear which create an exception to the general rule, and make it proper that a court of equity should entertain an action on behalf of the heirs. Where it is shown that there is a collusion between the surviving partner and the executor, the latter refusing to compel an accounting by the former, or where there has been such dealing between the two as renders it probable that the executor will not make a *bona fide* effort to secure an accounting, or other like circumstances appear, it has been held that the heirs may maintain the action. In the absence of special circumstances, heirs have no *locus standi* against the surviving partner. 2 Lindl. Partn. 494; *Harrison vs. Righter*, 11 N. J. Eq. 389; *Hyer vs. Burdett*, 1 Edw. Ch. 325.

Assuming, without deciding, that the facts, as pleaded in the present case, make it apparent that the executors have placed themselves in such an attitude towards the surviving partner, and the transaction sought to be set aside, as to bring the case within the exception, it becomes pertinent to inquire whether or not the appellants, as heirs, show any interest in the property of the late firm of Wysor & Jack upon which to predicate an action. If the executors had no power under the will to sell and convey, or the surviving partner was incompetent to purchase, or receive a conveyance, or if, for any of the other reasons urged, the transaction between the executors and the surviving partner was illegal, and the conveyance void, then the property remained in the possession, and under the qualified ownership, of the surviving partner, unaffected by what transpired. It is familiar law that a surviving partner has the right to the control and possession of the property of the firm, and that he may dispose of it in order to adjust the

partnership accounts, and he is only liable to the representatives of the deceased partner for what remains in his hands after the partnership affairs are settled; and there is nothing more thoroughly settled in the law of partnership than that the rights of the heirs of a deceased partner are subject to the adjustment of all claims between the partners, and attach only to the surplus which remains when the partnership debts are all paid, and the affairs of the firm wound up. Until all the debts are paid, the rights of the heirs do not attach. *Grissom vs. Moore*, 106 Ind. 296, 6 N. E. Rep. 629, 55 Am. Rep. 742, and cases cited; *Walling vs. Burgess*, 122 Ind. 299, 22 N. E. Rep. 419; *Deeter vs. Sellers*, 102 Ind. 458, 1 N. E. Rep. 854. The heirs of a deceased partner have no interest, as such, in the property of the firm. Their only remedy is to compel the surviving partner to account for the surplus after the settlement of all the partnership liabilities; and, ordinarily, a court of equity will not entertain jurisdiction of the affairs of a partnership until by its decree a final adjustment of the business can be effected. *Thompson vs. Lowe*, 111 Ind. 272, 12 N. E. Rep. 476, and cases cited; *Scott vs. Searls*, 5 Smedes & M. 25; *Rossum vs. Sinker*, 12 Cent. Law J. 205, and note. Now, while it appears that the deceased partner was indebted to the firm, and that the firm was indebted on partnership account, and that the surviving partner agreed, in consideration of the conveyance which is assailed, to pay these and other debts for which the testator's estate was liable, and while it may be inferred from the facts alleged in the complaint that the surviving partner has paid all the debts of the firm except what remains due to himself on the partnership account, it nowhere appears but that the entire interest of the deceased partner would be absorbed in the adjustment of the partnership account with the surviving partner. Having averred facts from which the inference arises that the surviving partner has paid all the partnership debts, and that the estate of the deceased partner is indebted to him, it is essential to the right of the heirs to call him to account that they make it appear that he has in his hands partnership property in excess of the amount required to reimburse himself. The averments in the complaint wholly fail to do this, and the conclusion is therefore unavoidable that the complainants fail to show such an interest in the property as entitles them to invoke the aid of a court of equity. This

conclusion necessarily follows from the application of the rule that a surviving partner is entitled to the custody and management of the assets, unless it be shown that he is committing waste, or otherwise mismanaging the affairs of the firm, and is only liable to the heirs or representatives of the deceased partner for what remains after everything is settled up. *Roys vs. Vilas*, 18 Wis. 179; *Shanks vs. Klein*, 104 U. S. 18, *ante; Anderson vs. Ackerman*, 88 Ind. 481; *Cobble vs. Tomlinson*, 50 Ind. 550.

If, however, it were conceded that it appeared that the partnership assets exceeded in value the amount necessary to adjust the partnership account, it would by no means follow that the appellants could maintain this action. It appears that, more than 14 years before the commencement of this action, the executors of the deceased partner, on the one hand, acting under the authority conferred by the will, and the surviving partner, on the other, consummated a final settlement and adjustment of the partnership account of Wysor & Jack. The powers conferred by the will are broad and comprehensive, and include the power to settle, adjust, and compromise all debts owing by the testator and to make settlements with his former partners, and each of them, without any authority from any court, and to sell and convey, either at public or private sale, with or without appraisement, any or all of the testator's real estate, on such terms as to them should seem best, in order to pay and satisfy debts against his estate. It thus plainly appears that it was the purpose of the testator to invest his executors with power to make compromises and settlements at their discretion, and to sell and convey his real and personal estate according to their best judgment. The statute in force at the time the sale was made provided, in effect, that, where lands were directed to be sold by a will, the sale, as to giving notice, conveying, taking notes, and mortgages, return and confirmation, should be conducted as sales by an administrator for the payment of debts, "unless, by the terms of the will, different directions are given; but no petition or notice of the filing thereof shall be required." 2 Rev. St. 1876, p. 530. As was, in effect, said in *Munson vs. Cole*, 98 Ind. 502, the land was not directed to be sold by the will. That was left to the discretion of the executors. But, if it had been, the executors were authorized to sell at their own discretion, upon such terms as

they might think best; and the authority thus conferred necessarily operated as "different directions" from those prescribed by the statute. The conveyance was not, therefore, invalid because the terms of the statute were not observed, or on account of any defect in the power of the executors.

This brings us to inquire whether the surviving partner occupied such a relation to the property, and to those concerned, as to disqualify him from purchasing the interest from the executors of the deceased partner. It is not to be doubted that a surviving partner is regarded as a trustee, primarily for the creditors of the firm, and, secondarily for the heirs or personal representatives of the deceased partner in all that remains, or fairly ought to remain, after adjusting the partnership account. Accordingly, it has been correctly laid down that "the surviving partners are held strictly as trustees, and their conduct in discharging their trust is carefully looked after, by the courts of equity. Thus, like other trustees, they cannot sell the property of the firm, and buy it themselves; nor, as the converse of this, can they buy from themselves property for the firm. Their trust being to wind up the concern, their powers are commensurate with the trust. * * * Their trust is to wind up the concern in the best manner for all interested, and therefore without unnecessary delay." Pars. Partn. 442; *Case vs. Abeel*, 1 Paige 393; *Sigourney vs. Munn*, 7 Conn. 11; *Jones vs. Dexter*, 130 Mass. 380, 39 Am. Rep. 459. Being in a sense a trustee, the surviving partner cannot, of course, speculate upon the property which the law commits to his custody, solely for his own advantage, in disregard of the interests of his *cestuisque trust*; and, if he makes profits out of the trust property, in the course of the adjustment of the affairs of the partnership, he is held to account to those interested for their share. He cannot purchase the trust property from himself, no matter whether the attempt be made by means of a public or private sale. This is so, not only because his duty as seller, and his interest as purchaser, are in irreconcilable conflict, but for the more cogent reason that it is indispensable to every legal contract of sale and purchase that there be two contracting parties competent to enter into a binding engagement with each other. Hence, an attempt by a trustee who holds property in trust, whether he be surviving partner, administrator, or whatever his designation, to sell the trust

estate to himself, is everywhere held to be void. *Martin vs. Wyncoop*, 12 Ind. 266; 74 Am. Dec. 209; *Hunsucker vs. Smith*, 49 Ind. 118; *Murphy vs. Teter*, 56 Ind. 545; *Rochester vs. Levering*, 104 Ind. 562, 4 N. E. Rep. 203; *Nelson vs. Hayner*, 66 Ill. 487. In the case of a sale thus made or attempted, it can well be said, it is of no avail to show that the trustee acted in good faith. Such transactions are poisonous in their tendencies, and violations of the principles of public policy. They are declared void, not for the purpose of affording a remedy against actual mischief, but to prevent the possibility of wrong. *Potter vs. Smith*, 36 Ind. 231; *Morgan vs. Wattles*, 69 Ind. 261. These principles do not apply or control in the case of a sale made by the personal representative of a deceased partner to a surviving partner. No good reason can be suggested why a surviving partner should be held legally incompetent and absolutely disqualified from becoming the purchaser of the interest of his deceased partner in the partnership business from his properly authorized legal representative, while very many reasons occur why such transactions, fairly entered into, should not only be upheld, but encouraged. In addition, the adjudged cases firmly support the right to make such sales. *Brown vs. Sloe*, 103 U. S. 828; *Baird vs. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; *Chambers vs. Howell*, 11 Beav. 6; *Roys vs. Vilas, supra.* In *Kimball vs. Lincoln*, 99 Ill. 578, after reiterating the rule that a surviving partner could not become a purchaser of the firm property at his own sale, nor from a co-trustee, the court said: "But the reason that would forbid a transaction of this character has no application to a case where a surviving partner purchases property from the executor or administrator of the deceased partner, and hence the rule which would govern the one case cannot control the other." See *Ludlow's Heirs vs. Cooper's Devisees*, 4 Ohio St. 1. It has thus been seen that the executors had plenary power to make settlements of the partnership account, and to sell and convey the real and personal estate of the testator at their discretion, and that the surviving partner was competent to negotiate a settlement of the affairs of the firm, and to purchase the interest of his deceased partner.

It is contended, however, that the power which the will conferred upon the executors was a power to sell the real or personal estate of the testator, and that the power thus conferred was not well executed by the conveyance of the testator's interest in the real estate of the firm in consideration of the agree-

ment to pay debts, as already indicated. The argument is that the agreement between the executors and the surviving partner was the same, in legal effect, as an exchange of property, and that a power to sell does not authorize an exchange. *Russell vs. Russell*, 36 N. Y. 581; 93 Am. Dec. 540; *Taylor vs. Galloway*, 1 Ohio, 232, 13 Am. Dec. 605; *Ringgold vs. Ringgold*, 1 Har. & G. 11, 18 Am. Dec. 250; *King vs. Whiton*, 15 Wis. 684; *Cleveland vs. Bank*, 16 Ohio St. 236, 88 Am. Dec. 445. Conceding that the proposition above stated is correct as a general rule, it cannot be made available in the appellant's behalf, for two reasons: (1) The power conferred upon the executors comprehended much more than a mere naked authority to sell and convey the testator's real estate. They were especially invested with power to make settlement with the partners of the testator, and with each of them, of all matters pertaining to the partnership business, and to adjust, settle, and compromise all debts, claims or demands against the estate of the testator, according to their best judgment; and, in addition to the foregoing power, they were authorized, at their discretion, to sell and convey the testator's real estate. Regarding the partnership assets, although consisting of lands, as personalty, and the power conferred by the fourth clause of the will to make a settlement of the partnership affairs invested the executors with ample authority, in case it became expedient or necessary, in the course of the settlement, to transfer property to the surviving partner to make such transfer. *Ludlow's Heirs vs. Cooper's Devisees*, *supra*. Moreover, the power contained in the fifth clause must be construed in connection with the duties imposed upon the executors by the fourth clause of the will. It will be observed that the executors are directed to sell and convey so much of the testator's real estate as they shall deem necessary to pay and satisfy his debts. Construing both clauses of the will together, it becomes apparent that the executors had authority to make any proper settlement which, in their discretion, seemed fit and best. (2) A settlement and final accounting with the surviving partner of the partnership matters having been actually consummated by the executors who were duly empowered, to that end, a court of equity will not disturb the settlement so made until it is impeached as fraudulent or unfair, or unless collusion between the executors and surviving partner is shown. Nothing less than fraud or

collusion will invalidate an arrangement between an executor and a surviving partner, whereby the latter became the purchaser of the deceased partner's share. *Travis vs. Milne*, 9 Hare, 141; *Davies vs. Davies*, 2 Keen 534; *Chambers vs. Howell, supra*; *Stainton vs. Carron Co.*, 18 Beav. 146; *Smith vs. Everett*, 27 Beav. 446; 2 Lind. Partn. (Rapalje's Ed.) 487. As has been seen, there is no pretense of any fraud or collusion in the present case.

Finally, after the settlement and accounting between the executors and the surviving partner has been had, and the account closed, as appears to have been the fact in the present case, a court of equity will not, after this long acquiescence, unexplained by circumstances, decree the opening up of the account, even though it appeared that the settlement had been irregularly made. It is the settled doctrine of courts of equity that unexplained delay in the prosecution of a right, until it becomes stale, constitutes such laches as forbids the interference of the court. *Smith vs. Thompson*, 7 Grat. 112, 54 Amer. Dec. 126, and note; *Hough vs. Coughlan*, 41 Ill. 131; 2 Story, Eq. Jur. § 1520. Here, as we have seen, there is an unexplained delay of 14 years. The statute of limitations would have barred an action between the partners themselves in case the settlements had been made by them. After this lapse of time a presumption of innocence and fair dealing arises, and removes every inference or imputation of bad faith from the transaction, and the settlement must repose as the parties made it. *Prevost vs. Gratz*, 6 Wheat. 481; *Rochester vs. Levering*, 104 Ind. 562, 4 N. E. Rep. 203.

The judgment is affirmed, with costs.

**NOTE:** See Mechem's Elem. of Partn., §§ 268, 309.

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## JONES vs. WALKER

*Supreme Court of the United States, 1880.*

103 U. S. 444, 26 L. Ed. 404.

W. H. Walker, who was a large dealer in liquors, in partnership with his son Frederick, made his will in July, 1870. One

of the clauses of the will provided for the continuance of the partnership and the conduct of this business after his death. It is in this language:

"It is my wish that my son Frederick carry on the business of W. H. Walker & Co. in that name and style, and in my storehouse where it is now carried on, giving him power to change the place, until my youngest child living to be twenty-one years of age arrives at that age, or for a shorter time, if he does not find it profitable. To that end all my capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but my other property shall not be so chargeable while Frederick carries on said business; my share shall pay the salary of an efficient man to aid him therein or he shall have compensation for his services as to and from my share. Agents and employés of the concern are to be paid by it. Frederick is not to be charged with $5,000 advanced by me to him on his coming of age, and he is to have the privilege to purchase, at a fair valuation and upon reasonable time, such portion of my share in said concern and its good will as will make his share equal to one-half. What he may so pay is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained and declared in the first of January after my death, and annually thereafter, shall be divided between my wife and children, or their descendants, and others. As my personalty is to be divided among them when my youngest child living to be twenty-one years of age arrives at that age, or at the death of my son Frederick before that time, or when he discontinues the business, my interest in the concern and its good will shall be sold as my executors may direct, and the proceeds divided, as the profits thereof are to be divided, with an obligation, if possible, that the business may be carried on under the old name and style."

The testator died in 1872, and the business was conducted as directed in the will until February 27, 1877, when the firm, on the petition of its members, was declared bankrupt by the proper court.

The appellant Jones was made assignee, and very shortly afterward filed the bill in the present case against the devisees of W. H. Walker's will.

*Martin Bijur* and *W. O. Dodd*, for appellant.

*John M. Brown*, contra.

MILLER, J. (After stating the facts as above.) The object of the bill is twofold, namely, to subject the property of the deceased, which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts, and to recover from the defendants money which they had received as dividends out of the profits of the business after the death of the testator.

In the recent case of *Smith vs. Ayre*, 101 U. S. 320, the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held that a testator might authorize the continuance of a partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that, unless he had expressly placed the whole, or some other part of his estate, under the operation of the partnership, it would not be presumed that he had so intended. See also *Burwell vs. Mandeville*, 2 How. (U. S.) 560; *Ex parte Garland*, 10 Ves. Jr. 110. In the case before us the testator declares, in express terms, that his capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but his other property shall not be so chargeable.

We see no reason in the present case for departing from the principle adopted in *Smith vs. Ayre*, after much consideration.

If dividends of profits out of the partnership business were honestly and fairly made, and when paid did not diminish the capital, nor withdraw what was necessary to pay the indebtedness of the concern, we see no reason why the persons receiving them should now be called on to refund them.

The will of the testator has a clause authorizing these dividends. The partnership had a long time to run and a large part of his capital was engaged in the business. There were children to be reared and educated, and it would have been very unreasonable that all the profits should be continually converted into capital, and that neither these children, nor Frederick, the other partner, should be permitted to receive dividends of profits, except on the condition of a liability to

that extent for any future transactions of the partnership through a period of fifteen or twenty years.

If these dividends had not been declared in good faith, nor really earned, if they had diminished the capital, or if, when they were made, debts existed which would have been left without means of payment, the persons sharing in the dividends would probably have been liable to these creditors to the extent of the money so received.

But we are satisfied that none of these conditions existed.

The case is mainly one of fact, and the testimony is very full. We do not think its discussion here profitable or useful. We are satisfied that at the time the last dividend was made the capital of the company was undiminished, and the firm amply able to pay its debts. Its misfortunes followed after this.

It very fully appears that the insolvency was brought about by accommodation indorsements for others, made after the last dividend was paid; that the firm, but for this, would have remained solvent, and that, in regard to this, none of the defendants were to blame except Frederick, who, being a full partner, is liable personally for all the debts of the firm.

An important matter in the case is a stipulation of the parties to the suit that all the debts owing by the firm were contracted subsequently to the declaration and payment of all the dividends, and none of the debts of the firm were in existence at the time these profits were declared and paid.

No creditor whose debt was in existence when these dividends were made was injured. All the debts then existing have been paid. What right had subsequent creditors to reclaim these dividends, who had no interest in the matter when they were paid? These defendants, except Frederick, were not partners. Their money was in the concern, and they received dividends instead of interest.

We repeat that there is no evidence of fraud or intentional wrong.

Decree affirmed.

NOTE: See Mechem's Elem. of Partn., § 208.

## DOGGETT vs. DILL.

*Supreme Court of Illinois, 1884.*

106 Ill. 560, 46 Am. Rep. 565.

William E. Doggett died on the 3d of April, 1876, testate, and Kate E. Doggett, appellant, who was named as executrix, qualified as such in the probate court of Cook county. Doggett, at the time of his death, and for many years before, was a member of the firm of Doggett, Barrett & Hills. In 1871, T. C. H. and Lucy W. Smith executed their two promissory notes for certain sums of money, payable to Charles H. Dill. The two notes, on the date of their execution, were guaranteed by Doggett, Barrett & Hills, the firm name to the guarantee being executed by Doggett. No effort was made by Dill to collect the amount due on the notes from the firm assets, or from surviving members of the firm of Doggett, Barrett & Hills, but after the death of Doggett he presented his claim to the probate court, to be allowed against the estate of the deceased. The probate court, upon the evidence introduced, allowed the claim, and the executrix appealed to the circuit court where a second trial was had resulting in a judgment against the estate. An appeal was then taken to the appellate court, where the judgment of the circuit court was affirmed, and this record is brought here by the executrix for the purpose of reversing the judgment of the appellate court.

*Stiles* and *Lewis* and *R. W. Pike*, for appellant.

*Dexter, Herrick & Allen*, for appellee.

CRAIG, J. (After stating the facts as above), proceeded: It is insisted by appellant that a partnership demand cannot be allowed against the individual estate of a deceased partner until the legal remedy against the partnership assets and surviving partners has been exhausted.

In *Mason vs. Tiffany*, 45 Ill. 392, which was a proceeding in chancery, by a creditor of a firm, to enforce payment of a firm debt against the estate of Tiffany, a deceased member of the firm, it was held, that every partnership debt being joint and

several, it follows necessarily, that resort may be had, in the first instance, for the debt, to the surviving partners, or to the assets of the deceased partner. In the decision of the case it is said: "If it was a fact that the surviving partners remained solvent for a long time before the assignment, and the assigned assets were sufficient to pay this claim, still these did not require the complainant to press his claim against them, the estate of the deceased partner being equally a fund on which he had a right to rely." This case seems to establish the doctrine, in plain words, that a creditor, in equity, has the right, where he holds a claim against a firm, one member of which has died, to proceed against the estate of the deceased member or the surviving partners, as he may elect.

In *Silverman vs. Chase*, 90 Ill. 37, the same question arose, and following the doctrine of the case last cited, it was said: "A partnership debt is joint and several, and the creditor has the right to elect whether he will proceed against the assets in the hands of the surviving partner or against the estate of the deceased partner, as held by this court in *Mason vs. Tiffany*, 45 Ill. 392. Nor will the laches of the creditor in following the assets of the firm preclude a recovery. The creditor has the right to proceed against the estate at any time before the statute of limitations has run, and a failure to pursue the partnership assets cannot be relied upon as a defense when suit is brought against the estate."

These two cases would seem to be conclusive of the question presented, so far, at least, as this court is concerned, as they, in terms, decide the same question involved in the record before us, and it would not be deemed necessary to say anything more on the question were it not for the fact that it is claimed that these cases are in conflict with prior decisions of this court, and the doctrine therein announced is not sound, and in harmony with the current of authority on the subject. We have therefore concluded to briefly refer to some of the authorities which have a bearing on the question, with the view of showing that the decisions of this court are fully sustained by the weight of authority.

Story on Partnership, Sec. 362, says: "The doctrine formerly held upon this subject seems to have been, that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners

were at the time, or subsequently became insolvent or bankrupt. But that doctrine has been since overturned, and it is now held, that in equity all partnership debts are to be deemed joint and several, and consequently the joint creditors have, in all cases, the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner, whether the survivors be insolvent or bankrupt or not." The same doctrine, but in different language, is declared by Story in his work on Equity Jurisprudence, Sec. 676.

Collyer on Partnership, Sec. 580, declares the law in the following language: "It is now established beyond controversy, that in the consideration of courts of equity a partnership debt is several as well as joint, and that upon the death of a partner a joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate, without reference to the question whether the joint estate be solvent or insolvent, or to the state of accounts amongst the partners."

Dixon on Partnership, 113, says: "When a liability exists the creditor may, at his option, either pursue his legal remedy against the survivor, or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivor to pay."

Lindley on Partnership, 1053, says: "Whatever doubt there may formerly have been upon the subject, it was clearly settled before the judicature acts, that a creditor of the firm could proceed against the estate of the deceased partner without first having recourse to the surviving partners, and without reference to the state of the accounts between them and the deceased." See also Para. Merc. Law, 192; Adams Eq. 172; Smith Merc. Law, 48; 3 Kent Com. 63, 64, and note.

From the citations made, it would seem that the law, as declared in *Mason vs. Tiffany*, and *Silverman vs. Chase*, *supra*, is fully sustained, at least by text-writers of high authority both in this country and in England. But it will not be necsary to rely alone on the text-books for a solution of the question, as the decisions in England and in many of the states are in harmony with the rule declared in the text-books. In England, as early as 1816, in *Devaynes vs. Noble*, 1 Mer. 529, it was

decided, that in equity partnership debts are joint and several, and a creditor holding a firm debt could resort to the estate of the deceased partner for payment, without showing the insolvency of the survivor. The rule adopted in the case cited was subsequently adhered to and followed in *Wilkinson vs. Henderson*, 1 M. & K. 582, and since the decision of these cases the doctrine there announced has been regarded as the settled law of England. In *Nelson vs. Hill*, 5 How. 127, the supreme court of the United States held that the creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner—that it was not necessary to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate. In support of the rule announced, Story on Partnership, Sec. 362, note 3, is cited. In a later case (*Lewis vs. United States*, 92 U. S. 622), *Nelson vs. Hill* is cited with approval. In *Camp vs. Grant*, 21 Conn. 41, 54 Am. Dec. 321, the supreme court of Connecticut, in an able opinion, adopt the rule of the courts of England. In *Weaver vs. Thornburg*, 15 Ind. 124, the question arose, and the supreme court of that state adopt the rule in the language of Story on Partnership, cited *supra*, and this decision was followed in a number of subsequent cases. *Dean vs. Phillips*, 17 Ind. 406; *Hardy vs. Overman*, 36 *Id.* 549. In *Freeman vs. Stuart*, 41 Miss. 141, the question arose, and the supreme court of that state held, in equity all partnership debts are joint and several, and a creditor has the right to proceed in law against the survivor, and an election also to proceed against the separate estate of the deceased partner, whether the survivor be solvent or not. See also *Irby vs. Graham*, 46 Miss. 428, where the English rule is fully approved. The same doctrine has been adopted in Vermont, in *Washburn vs. Bank of Bellow's Falls*, 19 Vt. 278. In Tennessee, in *Saunders vs. Wilder*, 2 Head 579. In Arkansas, in *McLain vs. Carson*, 4 Ark. 164, 37 Am. Dec. 777. In New Jersey, in *Wisham vs. Lippincott*, 1 Stockt. Eq. 353. In Alabama, in *Travis vs. Tartt*, 8 Ala. 577. In Florida, in *Fillyau vs. Laverty*, 3 Fla. 72. In Texas, in *Gaut vs. Reed*, 24 Texas 46, 76 Am. Dec. 94. In New Hampshire, in *Bowker vs. Smith*, 48 N. H. 111, 2 Am. Rep. 189. In New York and Georgia a contrary rule has been adopted, as will be found in the following cases: *Lamenas vs.*

*Trustees*, 11 Paige 80; *Voorhis vs. Childs*, 17 N. Y. 354; *Bennett vs. Woolfolk*, 15 Ga. 213. Upon an examination of the New York cases, it appears that the rule there adopted was supposed to be predicated on the old English cases, and when the courts of England established the doctrine which is laid down as the law in *Devaynes vs. Noble*, and *Wilkinson vs. Henderson*, *supra*, the New York courts refused to follow the English rule, but adhered to what was supposed to be the law in England as declared in that court prior to that time. Georgia seems to follow the New York rule. In a late case in Wisconsin (*Sherman vs. Kreul*, 42 Wis. 33), the supreme court say: "We are disposed to adopt the New York rule, that in order to recover against the administrators the plaintiff should allege and show that the surviving partner is insolvent." It is also claimed by appellant that the New York rule has been adopted in North and South Carolina, Ohio and Pennsylvania; but without stopping to determine precisely what the rule of the courts of these states may be, we are satisfied that the decided weight of authority is in harmony with the rule adopted in this state, and we are not inclined to change the rule heretofore adopted in this state, and follow the doctrine established by the courts of New York and Georgia, although we fully recognize the great ability of those courts.

It is also claimed that *Silverman vs. Chase* is in conflict with *Moline Water Power and Manufacturing Co. vs. Webster*, 26 Ill. 233, and *Pahlman vs. Graves*, *Id.* 405. This position is, in our judgment, based upon a misapprehension of those cases. In those cases there was a controversy between the partnership and individual creditors, and the principle of marshalling assets was applied, as it should have been. Where there are individual creditors, and partnership creditors, there is no doubt in regard to the law that all individual creditors have a prior claim against the individual assets, and partnership creditors have a prior claim against firm assets, and an individual creditor would have the right to insist that no part of the separate assets should be taken and applied in payment of firm debts until all separate debts had been paid in full. This familiar rule was applied in the two cases referred to, and also in the case of *Ladd vs. Griswold*, 4 Gilm. 25, 46 Am. Dec. 443. But there is no contest between the individual and partner-

ship creditors here, and hence the doctrine of marshalling assets does not apply. In this case no claims had been presented or allowed against the estate, of any character, except the one in controversy, and no individual creditor is resisting the allowance of the claim.

But independent of the authorities, we are satisfied that the rule, holding the estate of a deceased partner primarily liable in equity, is sound in principle. Doggett, in his lifetime, was individually liable for this debt, and if he had been sued, and a judgment obtained against him, any of his individual property would have been liable to be taken and sold in satisfaction of the debt. It is true, if he had been sued at law in his lifetime, it would have been necessary to join his partners as defendants in the action; but after judgment, it was not necessary to exhaust the partnership assets before individual property could be taken, but the creditor could resort to such property in the first instance, if he saw proper. Did the death of Doggett in any manner change the liability which existed on this contract before his death? We think not. The liability continued as before, but the remedy to enfore that liability was changed from a court of law to a court exercising equitable powers. Before his death the liability could only be enforced by a joint action against Doggett and his partners; after his death the liability continued, but could only be enforced in the probate court, which in the allowance of claims exercises equitable powers. The death of a debtor may extinguish a legal remedy on a joint contract, but we are not aware that it has ever been held that the death of a debtor could extinguish the debt or discharge the estate of the deceased.

In conclusion, we are satisfied, under the facts as disclosed by this record, appellee's claim was a proper one to be allowed against the estate of the deceased, and that it was properly allowed by the probate court.

The judgment of the appellate court will therefore be affirmed.

Judgment affirmed.

WALKER, J. If the doctrine of this opinion is to be applied in cases where there are individual creditors of the deceased partner, I dissent.

NOTE: For other cases upon this question see Mechem's Elem. of Partn., § 270.

## POPE vs. COLE.

*Court of Appeals of New York, 1873.*

55 N. Y. 124, 14 Am. Rep. 198.

Action by Charles C. Pope and others against Ann J. Cole, executrix of Lewis K. Cole, to recover a debt of the firm of Draper & Cole, of which defendant's testator was a partner. A judgment had been recovered by plaintiff for the same debt against Draper, the surviving partner, but the execution thereon had been returned unsatisfied. At the trial, defendant moved for a dismissal of the complaint, on the ground that the insolvency of the surviving partner was not alleged. The motion was denied. Evidence was then introduced to show that Draper had property sufficient to satisfy the judgment, which the sheriff did not discover. The court ruled that in the absence of collusion the sheriff's return was sufficient to sustain the action. Judgment for plaintiff was affirmed at general term. The defendant appealed to this court.

*Isaac D Garfield* for appellant.

*Frank Hiscock* for respondents.

GROVER, J. The question arising upon the exceptions in this case is whether an action will lie against the representatives of a deceased partner for the recovery of a partnership debt, after the recovery of a judgment therefor against the survivor and the return of an execution thereon unsatisfied, notwithstanding it may be shown that the survivor had property out of which the execution might have been satisfied, which was not discovered by the sheriff. The position of the counsel for the appellant, that this is not a suit by a judgment creditor to obtain payment of his judgment out of the property of his debtor, which cannot be seized upon execution, is correct. In this class of cases the counsel concedes that, in the absence of

collusion by the plaintiff, the return upon the execution issued to the proper county is conclusive evidence, and he might have added, the only competent evidence, that the legal remedy has been exhausted; at common law, when one joint debtor died, the remedy at law could only be had against the survivor. The estate of the deceased was only liable in equity for the payment of the debt. *The Trustees of the Leake and Watts Orphan House vs. Lawrence*, 11 Paige 80. Same case in error, 2 Denio 577, and cases cited. The same rule applied to the case of a deceased partner. Cases *supra*.

This was formerly the rule in England. The rule there as to a deceased partner has been somewhat changed, upon the theory that partners were severally as well as jointly liable for the payment of the partnership debts. This change has not been adopted in this state. See cases *supra*, and *Grant vs. Shurter*, 1 Wend. 148. To enable a partnership creditor to maintain an action against the representatives of a deceased partner, he must show an inability to collect his debt from the survivor. *Voorhis vs. Childs*, 17 N. Y. 354; *Richter vs. Poppenhausen*, 42 id. 373. But when such inability is shown, the action may be maintained. The counsel for the appellant insists that the only mode of showing such inability is to aver and prove the actual insolvency of the survivor. His argument is that, inasmuch as the legal title to all the partnership assets vests in the survivor, and that these are the primary fund for the payment of the partnership debts, equity will not enforce payment of such debts from the estate of the deceased until actual insolvency of the survivor is established. But we have already seen that payment of a joint debt, when no partnership between the debtors ever existed, can be enforced out of the estate of one of the deceased debtors under the same circumstances only as in the case of partners, that is, by showing an inability to collect the debt from the survivor. This is so, irrespective of the question whether there was at the time of the death of the joint debtor any joint property owned by the debtors which vested in the survivor.

A surviving partner is equally liable at law for the payment of the entire copartnership debts, although there were no assets of the firm at the time of the decease of his partner, as though

such assets were ample for that purpose. This shows that the reason assigned by the counsel for the rule is not the true one. That reason was given, by some of the judges in the cases above referred to, for not adopting the later English doctrine, holding partners severally, as well as jointly, liable for the debts of the firm, and upon this ground sustaining actions against the representatives of the deceased partner for the recovery of the debts of the firm, wholly irrespective of the ability of the survivor to pay them. The legal remedy upon all joint obligations, in case of the death of one or more, could, by the common law, be had only against the survivors. The estate of the deceased was, at law, discharged, but equity held such estates liable. The creditor's case, then, was this: He had a legal remedy against the survivor for the collection of his debt, and a lien in equity upon the estate of the deceased. But courts of equity, as a general rule, would not entertain an action in case there was an adequate legal remedy, by which full redress could be obtained. Hence, it followed that, to enable a creditor to collect his debt in equity from the estate of a deceased joint debtor, he must show that he could not collect it by proceedings at law against the survivor. It was held sufficient, for this purpose, to aver and prove the insolvency of the survivor. Hence, this averment will be found in the reported cases. But the want of an adequate legal remedy is equally manifest where that has been resorted to by the creditor in good faith, and exhausted, without obtaining satisfaction. It has there been demonstrated that there is no such remedy, and the creditor may then avail himself of the equitable liability of the estate of the deceased debtor. All this has been done by the plaintiffs in this case.

It is now said, by the counsel for the appellant, that the plaintiffs ought to be precluded from this equitable remedy, for the reason that the survivor had property from which, had the sheriff discovered it, the execution might have been satisfied. But the plaintiffs were not in fault for the failure of the sheriff to discover this property. They had done all that was required of them when they had delivered the execution to sheriff. It was not their, but the duty of the sheriff, to ascertain whether the debtor had property to satisfy it; and when the sheriff returned that he had not, the legal remedy was exhausted, and the plaintiffs were at liberty to pursue their equitable remedy

against the estate of the deceased. It follows that, where the plaintiff can prove the insolvency of the survivor and thus show that he has no legal remedy for the collection of his debt against him, he may proceed to enforce payment from the estate of a deceased partner, or other joint debtor, without bringing an action against the survivor, or he may exhaust his legal remedy against the survivor, and then proceed against the estate of the deceased debtor. The representatives of the estate of the deceased debtor have an adequate remedy against the sheriff, in case of a wrongful return of the execution.

The judgment appealed from must be affirmed, with costs.

All concur; ANDREWS, J., not sitting.

Judgment affirmed.

NOTE.—See Mechem's Elements of Partn., § 270.

# LINDNER vs. ADAMS COUNTY BANK.

*Supreme Court of Nebraska, 1896.*

49 Neb. 785, 68 N. W. Rep. 1028.

The Adams County Bank brought this action against Abraham Loeb and wife, Lindner, the administrator, Rosa Hirsch, the widow, and Benjamin and Jacob Hirsch, the heirs, of Samuel Hirsch, deceased, to foreclose a mortgage executed by Loeb and Samuel Hirsch in favor of the bank. The case proceeded to foreclosure and sale, and after satisfying the bank's debt there remained a large surplus, one-half of which was afterwards, by the court, ordered paid to the guardian of the heirs of Samuel Hirsch. The present controversy relates to the disposition of the remainder of the surplus, it being claimed on one hand by an assignee of Loeb, and on the other hand by the administrator of Hirsch. The district court made an order directing its payment to William Kerr, the assignee of Loeb. This order was made on consideration of the application and the record in the case, without evidence; and the question presented for review is substantially, therefore, whether the administrator's application, taken in connection with facts established by the record, was sufficient, if the allegations contained in the application were true, to entitle him to the unpaid surplus. The application alleges, in brief, that Loeb and Samuel Hirsch were, in the latter's lifetime, partners, and that the real estate sold under the decree of foreclosure was partnership property; that, after the death of Hirsch, Loeb collected the rents and profits of the real estate, and continued to carry on the business and collect debts due the partnership, but failed to pay the debts of the partnership, and had refused to apply moneys coming into his hands for the purpose of discharging such debts, but had converted the partnership property to his own use; that the partnership owned property largely in excess of its liabilities; that Loeb is insolvent; that, on an accounting between Loeb and Hirsch's administrator, Loeb would be indebted to the latter in at least $3,000. Lindner brings error.

*W. S. Morlan* and *J. E. Kelley*, for plaintiff in error.

*Capps & Stevens*, for defendants in error.

IRVINE, C. (After stating the facts.) In the briefs many questions are discussed with regard to the rights of surviving partners, and the propriety of an examination into their transactions, and an accounting, in a proceeding of this character. We think, however, a single principle controls the decision of the case. The assignment of the surplus arising from the sale from Loeb to Kerr was made before the sale was confirmed. It recites a consideration of $1,250 paid by Kerr to Loeb. Its legal effect was as an assignment of a chose in action belonging to a partnership, by the surviving partner, to a stranger. Neither by any averment in the administrator's application for the surplus, nor elsewhere in the record, is the *bona fides* or consideration of this assignment attacked. On the dissolution of a partnership by the death of one of the partners, the partnership property vests in the survivor, in trust, it is true, for the settlement and winding up of the partnership business, but nevertheless with power of disposition for that purpose; and the surviving partner may, in such case, convey or transfer the property to a stranger, who will take title by virtue of such conveyance or transfer. *Fitzpatrick vs. Flannagan*, 106 U. S. 648, 1 Sup. Ct. 369. Not only may tangible property be so transferred by a surviving partner, but also choses in action. *Johnson vs. Berlizheimer*, 84 Ill. 54, 25 Am. Rep. 427; *Roys vs. Vilas*, 18 Wis. 169; *Daby vs. Ericsson*, 45 N. Y. 786; *Bohler vs. Tappan*, 1 Fed. 469. It follows from this principle that the assignment by Loeb, the surviving partner, to Kerr, of any surplus that might remain after satisfying the decree in favor of the bank (such assignment being unimpeached) operated to transfer the right of the partnership to such fund to Kerr, and it remained no longer a partnership asset. So that the question as to whether, in the absence of such an assignment, an accounting might be had in this action between the surviving partner and the personal representative of the deceased partner, and the surplus distributed in accordance with the result of such accounting, is not material to the present case. A case much in point is *Willson vs. Nicholson*, 61 Ind. 241. That was an action on a promissory note made to a partnership, which had been assigned by delivery to the plaintiff by the sur-

viving partner. Certain creditors of the partnership had filed counter claims, alleging insolvency of the firm and of all its members, and that the note in suit constituted the firm's only assets, and that the plaintiff had purchased it with full knowledge of the facts. They prayed that the proceeds of the instrument should be applied to the payment of their claims. The supreme court affirmed the action of the trial court in striking out the counter claims, on the ground that the surviving partner succeeded to the assets, and had the right to dispose thereof, and that, in the absence of any allegation to the contrary, it would be presumed that the assignment to the plaintiff was *bona fide*, and for a valuable consideration. Affirmed.

NOTE: See Mechem's Elem. of Partn., § 270.
Compare with *Durant vs. Pierson*, next following.

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## DURANT vs. PIERSON.

*Court of Appeals of New York, 1891.*

124 N. Y. 444, 26 N. E. Rep. 1095, 21 Am. St. Rep. 686.

This action was brought to set aside an assignment made by the defendant, Henry R. Pierson, as survivor of the late firm of Henry R. Pierson & Son, to the defendant Robert C. Pruyn, for the benefit of creditors, upon the ground that it was fraudulent and void as against the creditors of the firm, for the reason that it directed the payment to the National Commercial Bank of the sum of fifteen thousand dollars.

The referee has found as facts that Henry R. Pierson, the elder, died on the first day of January, 1890, leaving the defendant Henry R. Pierson, his son, as the sole surviving member of the firm; that the firm kept an account with the National Commercial Bank of Albany in the name of Henry R. Pierson & Son, which was open and unsettled upon the books of the bank on the ninth day of January, 1890, at which time the defendant Pierson made application to the bank for the loan of $15,000; that upon making such loan there was credited upon the books of the bank to the firm the sum so loaned, and

a note was given therefor, payable on demand, signed in the name of the firm by Henry R. Pierson, survivor; that $10,150 thereof was subsequently drawn out of the bank by the checks of the defendant Henry R. Pierson, signed by him as survivor, and the same was applied and used in the payment of the debts of the firm. The referee further found as facts that the purpose of said defendant Henry R. Pierson in applying for and obtaining such loan was to procure money with which to pay the obligations of the firm which had matured or were about to mature, and that the bank understood such to be the purpose of the loan at the time of making the same; that the firm was in fact insolvent on the first day of January, 1890, at the time of the decease of the elder Pierson, but that such fact was not known to either the defendant Pierson or to the National Commercial Bank at the time the loan was made. He further found as a fact that in inserting in the assignment the direction to pay the National Commercial Bank of Albany from the firm property the amount of the note, the defendant, Pierson acted with intent to hinder, delay and defraud the creditors of the firm, but that at the time of making such assignment the defendant Pierson believed that such note was a firm obligation, or an obligation which was legally enforceable against the property and assets of the firm, and that he therefore was not morally chargeable with wrong in directing its payment out of the property of the firm; that the appropriation by him of the money borrowed of the bank to the payment of the firm debts created a claim in his favor against the estate which before the assignment could have been properly paid out of the firm's assets. As a conclusion of law, he found that the debt created by the loan by the National Commercial Bank was the individual debt of the defendant Pierson, and not that of the firm; that the assignment was consequently fraudulent as to the plaintiff, and directed judgment accordingly.

*Marcus T. Hun*, for appellants Pruyn and Pierson.

*Abraham Lansing*, for the National Bank of Albany, appellant.

*George L. Steadman*, for the respondent.

HAIGHT, J. (After stating the facts as above.) If the debt created by the loan be the individual liability of the survivor,

and one that the firm ought not to pay, and the firm be insolvent, the survivor had no right in his assignment to direct its payment out of the firm's assets, and by so doing the assignment was rendered fraudulent as to the creditors of the firm. *Wilson vs. Robertson*, 21 N. Y. 587; *Menagh vs. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683; *Second National Bank of Oswego vs. Burt*, 93 N. Y. 233-245; *Bulger vs. Rosa*, 119 N. Y. 459-465.

It thus becomes important to determine whether the loan contracted by the survivor became a firm obligation for the payment of which its assets may justly be applied. As we have seen, the note given upon procuring such loan bore the name of the firm and that of Henry R. Pierson as survivor, but at the time this note was given it was known to all of the parties concerned that the senior member of the firm had died.

The death of a partner puts an end to the copartnership, and there is no longer any power or authority of the surviving partners to carry on for the future a partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof. Story on Part., sec. 342, 343; *Hall vs. Lanning*, 91 U. S. 160-170; *Farr vs. Morrill*, 53 Hun (N. Y.) 31-35.

It is thus apparent that whilst the note in form would appear to create an obligation of the firm, it is at law unavailable as such, for the reason that there was no power in the survivor to make it. But it does not follow but that it is a claim which ought, in justice and equity, to be paid out of the firm's assets. If it is, the preference in the assignment would not be void, for the law will not declare fraudulent that which equity adjudges right and proper. *Denton vs. Merrill*, 43 Hun (N. Y.) 224-229.

We must therefore consider whether there are equities which will support the claim of the bank to be paid out of such assets. It is apparent that the money borrowed from the bank by the survivor was for the purpose of paying the creditors of the firm the claims then matured and pressing. The amount of the loan was credited upon the open account of the firm with the bank, and subsequently ten thousand dollars thereof, or thereabouts, were drawn out by the survivor upon his check, and used in the payment of the liabilities of the firm. At the time this loan was made, it was not supposed by the offi-

cers of the bank, or the surviving partner, that the firm was insolvent, and no question is made but that both parties acted in good faith. The question is therefore presented whether a surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and by so applying the money borrowed create an equity for the satisfaction of which the assets of the firm may properly be devoted. As we have seen, the survivor became entitled to the assets, which he had the right to sell, mortgage, and dispose of, in order to pay the debts and close up the affairs of the copartnership. If he had the power to sell or mortgage, it would seem to follow that he had the power to borrow and pledge the assets for the repayment of the loan, and the amount borrowed having been faithfully applied in liquidation of the debts of the copartnership, equity will recognize the justness of the claim of the party making the loan. Cases may arise where the exercise of such authority may be highly expedient, if not necessary, for the preservation of the rights of creditors and persons interested in the distribution of the assets of the firm; as, for instance, creditors may by levy expose the assets to a forced public sale under circumstances which would work great sacrifice to the estate. In case a survivor should be insolvent, he might be able to raise money by a pledge to repay out of the partnership assets when he could not obtain it upon his own credit. We do not see that harm could result to the other creditors by permitting this to be done; for it would not increase the obligations of the firm nor lessen their share in the distribution of the assets in case the firm be insolvent. It is not questioned but that the survivor had the right to turn out as a security or pledge the assets of the firm in payment for the money received by him. He could have sold the assets and repaid the money loaned at any time before executing the assignment, and without taint of fraud. It is not apparent how the rights of the parties are changed and the act of the survivor made fraudulent by doing that in the assignment which he had the right to do immediately before executing it.

The precise question involved in this case does not appear to have been passed upon in any reported case, so far as we have been able to discover, except in *Haynes vs. Brooks*, 8 Civ. Proc. Rep. 106-113, where an assignment was made for the benefit of creditors by a surviving partner. In that case, as

in this, the creditors had loaned money to the surviving partner to pay a note of the firm. VAN VORST, J., in commenting upon the transaction, said: "If a firm obligation was retired by the use of the money loaned or advanced by Brown & Co., the surviving partner would have been entitled to be repaid out of the firm property. As the moneys of Brown & Co. in fact paid a firm obligation, I see no objection in the subrogation of them in equity to the rights of the surviving partner, or to the regarding of them as entitled to be repaid out of the firm assets. That works injustice to no one." The learned judge concluded by ordering the complaint dismissed, thereby sustaining the validity of the assignment. This case was affirmed in the general term, 42 Hun (N. Y.) 528, and in this court in 116 N. Y. 487. This question, however, was not considered in either of the appellate courts.

In *Matter of the Estate of Davis and Desauque*, 5 Whart. (Pa.) 530, 34 Am. Dec. 574, it was held that after the dissolution of a copartnership the partner authorized to settle the estate may borrow money on the credit of the firm for the purpose of paying its debts, and if the credit be given in good faith, though with a knowledge of the dissolution, and the money borrowed be faithfully applied in liquidation of the debts of the partnership, the creditor has a claim against the firm assets, and is not to be considered as a creditor merely of the partner borrowing.

In the case of *Prudhomme vs. Henry*, 5 La. Ann. 700, it was held that where a liquidating partner, after dissolution, has borrowed money to pay the debts of the firm, the partnership is liable as far as the evidence shows that the money was used for the benefit of the firm.

In the last two cases the partnerships were not insolvent, and the question arose as between the partners. The courts, however, recognized the claim of the lenders as one which ought to be paid by the partnership.

In the case under consideration, it is true that the partnership is insolvent, and the question arises as between the bank and creditors of the partnership, but the creditors have not been harmed or prejudiced by the action of the bank in loaning the money to the survivor, for the assets were increased in value to the amount of the loan, and the money drawn out of the bank was applied in extinguishment of the

claims of the creditors, thus reducing to that extent the liabilities of the firm.

When a partnership is dissolved by the death of a partner, the survivor is entitled to the possession and control of the joint property for the purpose of closing its business, and to that end and for that purpose he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property, make provision for meeting its obligations. He may, for that purpose, borrow money, and give a valid pledge of the copartnership property for its repayment. *Williams vs. Whedon*, 109 N. Y. 333, 4 Am. St. Rep. 460; *Emerson vs. Senter*, 118 U. S. 3-8; *Fitzpatrick vs. Flannagan*, 106 U. S. 648; *Butchart vs. Dresser*, 4 De Gex, M. & G. 542, 10 Hare 453; *In re Clough, Bradford Commercial Banking Co. vs. Cure*, L. R. 31 Ch. Div. 326.

In *Case vs. Beauregard*, 99 U. S. 119-124, Mr. Justice STRONG, in commenting upon the rights of partners in a suit involving the marshalling of the assets, says: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity that partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have the privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. This equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence if he is not in a condition to enforce it, the creditors of the firm cannot be: *Rice vs. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; Appeal of York County Bank, 32 Pa. St. 446.

"But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the applica-

tion of those assets primarily to the payment of the debts due them, whenever the property comes under its administration."

In the case of *Saunders vs. Reilly*, 105 N. Y. 12, 59 Am. Rep. 472, it was held that a mere general creditor of a firm having no execution or attachment has no lien whatever upon its personal assets; that while firm creditors are entitled to a preference over creditors of the individual members of the firm in the payment of their debts out of the assets, in the course of liquidation, their equity is not held or enforceable in their own right, but it is a derivative one, practically a subrogation of the equity of each individual partner to have the firm assets applied primarily to the payment of its debts, and where no such equity exists in favor of any member of the firm, the firm creditors have none, and therefore where a judgment is recovered against all the members of a firm upon a joint obligation, but not an indebtedness of the firm, the firm property may be levied upon and sold on execution issued on the judgment. See also *Dimon vs. Hazard*, 32 N. Y. 65; *Stanton vs. Westover*, 101 N. Y. 265; *Kirby vs. Schoonmaker*, 3 Barb. (N. Y.) Ch. 46; *Brown vs. Higginbotham*, 5 Leigh, (Va.) 583, 27 Am. Dec. 618; *Peyton vs. Stratton*, 7 Gratt. (Va) 380; *Stebbins vs. Willard*, 53 Vt. 665.

It appears to us that the conclusion is warranted from the authorities referred to that where a person in good faith loans money to a surviving partner, and where the money is faithfully applied by such partner in satisfaction of the liabilities of the firm, the claim becomes one which in equity should be paid out of the assets of the firm; and in an accounting between the survivor with the personal representative of the deceased partner, equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment so directing is not fraudulent.

Attention is called to the fact that the deceased partner left a will making his survivor his sole devisee and legatee, and it is claimed that he left no individual debts. If this were so, it is not apparent that it would affect the equities of the bank, but the evidence is silent upon the question as to whether or not the deceased left individual debts. The referee refused to so find, and we cannot assume that there were none.

It may also be claimed that, the firm being insolvent, the survivor has no equities to which the bank can be subrogated, for the reason that he is liable individually for the payment of the firm debts. But the bank is not asking for any relief by way of subrogation; it is only defending the provision, already made for it in the assignment, from the claim of fraud. Even though both the firm and the survivor were insolvent, the survivor still had the right to have his contract recognized, and to say which of the creditors should be paid first, and to so provide in his assignment. *Williams vs. Whedon*, 109 N. Y. 333, 4 Am. St. Rep. 460.

It follows that the judgment should be reversed, and a new trial granted, with costs to abide the final award of costs.

VANN, J., dissents, upon the ground that the note preferred in the assignment as a firm debt was simply an individual debt of the surviving partner, who, as he did not bind the firm in creating the debt, could bind neither it nor its property by directing payment out of the firm assets.

Judgment reversed.

NOTE: See Mechem's Elem. of Partn., § 268.
Compare also with cases in Subd. XV, *post*.

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## HUMPHRIES vs. CHASTAIN.

*Supreme Court of Georgia, 1848.*

5 Ga. 166, 48 Am. Dec. 247.

Assumpsit on a note indorsed in the firm name of Chastain & Harvey, the indorsement having been made by Harvey (now insolvent), without the authority of Chastain, after the dissolution of the firm. Evidence, offered to show that the indorsement was in payment of a previous debt of the firm, having been rejected, the plaintiff, after judgment against him, brought error on that ground.

*Lyon*, for the plaintiff in error.

*Strozier*, for the defendant in error.

WARNER, J. The question made by the record in this case is, whether one partner, after the dissolution of the copartnership, can bind his copartner by a new contract, for the payment of a pre-existing copartnership debt.

That after the dissolution of a copartnership, one copartner cannot bind the other by indorsing a note in the copartnership name, is, we think, well settled, both upon principle and authority; and that the note so indorsed, is in payment of a debt due by the copartnership, makes no difference. Lyon on Part. 274; *Sanford vs. Mickles*, 4 Johns. (N. Y.) 224; *Hackley vs. Patrick*, 3 Id. 536; *Folts vs. Pourie*, 2 Desau. Eq. 40. In *Bell vs. Morrison*, 1 Peters (U. S.) 352, it was held that a dissolution of a copartnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts; and the court below did not err in rejecting the testimony offered, and ruling that Chastain was not bound by the indorsement made by Harvey, in the name of the partnership, after its dissolution.

Let the judgment of the court below be affirmed.

NOTE: See Mechem's Elem. of Partn., §§ 271, 272.

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## VAN KEUREN vs. PARMELEE.

*Court of Appeals of New York, 1849.*

2 N. Y. 523, 51 Am. Dec. 322.

Appeal from a judgment of the supreme court, in favor of the plaintiff, in assumpsit on a promissory note. The plea was the statute of limitations, and the only question was, whether, under the facts stated in the opinion by BRONSON, J., the apparent bar of the statute had been removed as against all the makers, by a new promise made by one only.

*C. W. Swift* and *H. Swift*, for appellants, the makers not parties to the new promise.

*Dodge & Campbell*, for the respondent, the holder of the note.

BRONSON, J. The question is on the statute of limitations; and the case is shortly this: The plaintiff sues on a note made

by three partners, on the first day of May, 1831, and payable immediately. The partnership was dissolved in the spring of 1832; the suit was commenced in July, 1847, more than sixteen years after the cause of action had accrued; and the jury find a promise by "John Van Keuren, one of the defendants," within six years before the action brought, but they find no promise by either of the other defendants. The new promise by John Van Keuren was made more than nine years after the partnership was dissolved, and more than four years after an action upon the note had been barred by the statute of limitations. It cannot but strike every one with some degree of astonishment that the promise of one, made at such a time, and under such circumstances, should bind all of the defendants. But still the question must be considered upon authority; and if the rule has been so settled, it must be followed, whatever we may think of it as an original proposition.

Before looking at the cases, I will inquire, for a moment, how the matter stands upon principle. And however much it may be out of the ordinary course, I will begin by referring to the statute. The words are: "The following actions [including assumpsit] shall be commenced within six years next after the cause of such action accrued, and not after." 2 R. S. 295, sec. 18. If the plaintiff sues on the note, "the cause of action accrued" more than sixteen years before the suit was commenced, and of course the action is barred. There is but one possible mode of escaping this difficulty, and that is by saying that the plaintiff does not sue upon the note, but upon the new promise; treating it as a new contract, springing out of, and supported by, the original consideration. That will do very well where the original promise was made by one, or if by more than one, where all join in making the new contract. But in this case, the new contract was made by only one of the three original debtors; and the question is, what binds the other two? As they did not contract for themselves, it is not their agreement, unless John Van Keuren, who made the new promise, had authority to contract for them. The only authority claimed for him is, that he had before been the partner of the other two. This leads to an inquiry concerning the principle on which each partner can bind all his associates. And it is generally agreed that it is the principle of agency. Each partner, when acting

within the scope of the partnership, is deemed to be the authorized agent of all his fellows. The authority is presumed from the nature and necessity of the case; for without it, third persons would not be safe in dealing with one of the associates, and the business of the partnership could not be carried on with success. Now, how long does this presumed agency continue? Clearly, no longer that the necessity for it exists; and for most purposes, the necessity ceases with the termination of the partnership. When that is dissolved, there is no longer any ground for presuming an agency, except as to such things as are indispensable in winding up the concerns of the company. If there be no agreement to the contrary, it may be presumed that each partner still has authority to dispose of the partnership property, to collect, adjust, and pay debts, and give proper acquittances. But there is no ground whatever for presuming a power to make new promises or engagements in the name of the firm, even though they only change, without increasing the prior obligations of the partners. We shall presently see, upon authority, that they have no such power.

In reference to the statute of limitations, a distinction has sometimes been taken between a new promise made before the statute has run, and one made after the parties have been exonerated by the lapse of time. That would sustain the defense in this case, for the statute had run upon the claim long before the new promise was made. But the defense may be rested upon the still broader ground, that the dissolution of the partnership was a revocation of the agency, and the power of the partners to bind each other by new engagements ceased from that moment.

The statute of 21 James I, c. 16, which limited actions on promises to six years, was not very well received by the legal profession; and although the early decisions under it are not open to much observation, it was not long before the courts began to regard the statute with disfavor, and to resort to the most subtle constructions for the purpose of restricting its influence. There was a period when one who was spoken to on the subject of an old debt could not well give a civil answer, without saying enough to take the case out of the statute. At a later period, and since the commencement of the present century, the courts began to regard this as a beneficial statute—a

statute of repose—and commenced the difficult task of retracing their steps. But there were many obstacles in the way of the backward movement, and the legislature, both here and in England, took up the matter, and went beyond the old statute, by requiring the new promise or acknowledgment to be in writing. In consequence of the early departure from principle in the construction of the statute, the different views which prevailed at different periods, and the unequal pace of the courts in attempting to get back on to solid ground, the books are full of conflicting decisions; and any attempt to reconcile them would be a useless waste of time. I shall not, therefore, go into a general review of the cases.

The leading case on this question in England is *Whitcomb vs. Whiting*, 2 Doug. 652, where Lord MANSFIELD and his associates held, that part payment, within six years, by one of four joint and several makers of a promissory note, took the case out of the statute of limitations as to all of the makers. That case is distinguishable from the one before us in two particulars. First, it does not appear in that case that the action was barred prior to the payment, while here the statute bar was complete long before the new promise was made. Second, that was the case of a payment, which has been deemed much safer ground to go upon than a new promise or acknowledgment. Lord TENTERDEN'S act, 9 Geo. IV, c. 14, which requires a writing in the case of a new promise or acknowledgment, leaves the effect of a payment untouched; and such, in substance, is the provision in our recent code. Stat. 1849, p. 638, sec. 110. In *Wyatt vs. Hodson*, 8 Bing. 309, TINDAL, C. J., said: "The payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation, and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." There is force in these remarks.

But I do not intend to lay much stress upon the distinctions between that case and the one at bar. Lord MANSFIELD made no distinction between the influence of a payment and a promise, and if his reasoning is sound, it reaches this case. His words are, "payment by one is payment for all, the one acting virtually as agent for the rest, and in the same manner, an admission by one is an admission by all, and the law raises

the promise to pay, when the debt is admitted to be due." Nothing but the great name of Lord MANSFIELD could have given currency to this reasoning. It is plain enough that "payment by one is payment for all," so far as relates to the satisfaction of the debt, but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due; and like any other admission, it can only affect the party who makes it, unless he has authority to speak for others, as well as himself. A joint debtor has no such authority. It cannot be justly inferred from the relation which he sustains to the other joint debtors; and though he may conclude himself by an admission, he cannot conclude them. His lordship, after saying that "payment by one is payment for all," adds, "the one acting virtually as agent for the rest." If the meaning be, that there is such an agency as will make the payment by one inure to the benefit of all the joint debtors, the reasoning is well enough, but it proves nothing on the point in controversy. If the meaning be, that one joint debtor is the agent of the others for the purpose of making admissions to bind them, that was assuming the very point to be proved, and the assumption had neither authority nor argument to support it. There is nothing in the relation of joint debtors from which such an agency can be inferred. A joint obligation is the only tie which links them together, and from the nature of the case, payment of the debt is the only thing which one has authority to do for all. I am persuaded that such a decision would not have been made had it not been for the strong disposition which prevailed at that time to get around the statute of limitations. It was in direct conflict with *Bland vs. Haselrig*, 2 Vent. 151, which was decided ninety years before, when the statute was in better repute; and which is an authority in point, against the judgment under review. The case was this: in assumpsit against four, the statute of limitations was pleaded, and the verdict was, that one of the defendants promised within six years, but the others did not. Upon this verdict, judgment was rendered for the defendants. The case of *Whitcomb vs. Whiting*, 2 Doug. 652, has been several times questioned in England, and in *Atkins vs. Tredgold*, 2 Barn. & Cress. 23, the court seemed much disposed to disregard it. But the authority of a

great name has proven more than a match for common sense; and the decision in Douglas is now regarded as good law in England. *Perham vs. Raynal*, 2 Bing. 306; *Pritchard vs. Draper*, 1 Russ. & M. 191. But it is not so in this country. Although the case in Douglas has been followed in some of the states, it has been questioned in others; and in several of the states, and by the supreme court of the United States, it has been wholly disregarded. I shall hereafter have occasion to refer to some of the cases.

I will now inquire how the question stands in this state. It first came up in *Smith vs. Ludlow*, 6 Johns. (N. Y.) 267, nearly forty years ago, when the statute of limitations was in bad repute, and when few men ventured to think for themselves after Lord MANSFIELD had spoken. The court said, that where the original debt was proved, the confession of one partner, though made after the dissolution of the partnership, would bind the other, so as to prevent him from availing himself of the statute of limitations. This was said on the authority of *Whitcomb vs. Whiting*, already mentioned, and *Jackson vs. Fairbank*, 2 H. Black. 340, which was decided on the authority of the same case, though it went a more extravagant length. Of the case in Douglas I have already spoken; and of the case in Blackstone it is enough to say that it has been condemned in England, *Brandram vs. Wharton*, 1 Barn. & Ald. 463; and overruled in this state; *Roosevelt vs. Mark*, 6 Johns. Ch. (N. Y.) 266, 291. I may add, that what was said in *Smith vs. Ludlow*, about binding one partner by the confession of the other, made after the partnership had been dissolved, was not necessary to the decision of the cause; for there had been confessions by both of the partners, which the court held sufficient to take the case out of the statute, without making the admission of one evidence against the other. Still, on the authority of this case, and those in Douglas and Blackstone, it was decided in *Johnson vs. Beardslee*, 15 Johns. (N. Y.) 3, that the promise of one joint debtor was sufficient to take the case out of the statute. And in *Patterson vs. Choate*, 7 Wend (N. Y.) 441, it was held, that although one partner can not after a dissolution bind the other by a new contract, yet his acknowledgment of a previous debt due from the partnership will bind the other partner, so far as to prevent him from availing himself of the statute of limitations. This doctrine has been men-

tioned on other occasions: *Hopkins vs. Banks*, 7 Cow. (N. Y.) 653; *Roosevelt vs. Mark*, 6 Johns. (N. Y.) Ch. 291; *Dean vs. Hewit*, 5 Wend. (N. Y.), 262; but there are, I believe, no other decisions in this state to the like effect. In *Patterson vs. Choate*, the six years had run, and the bar was complete before the acknowledgment was made. No one, I venture to say, who does not go upon the ground that the statute of limitations ought not to be inforced, can assign a solid reason for the distinction between contracting a new debt against a former partner, and making an acknowledgment which shall charge him with that which, though once a debt, has ceased to be so by the operation of law. I agree with the late Chief Justice SPENCER, in *Sands vs. Gelston*, 15 Johns. (N. Y.) 519, that "the statute of limitations is the law of the land;" and that in point of principle "there is no substantial difference between a debt barred by the statute of limitations and the debt for the payment of which the debtor has been exonerated by a discharge under a bankrupt or insolvent act." Still, if there was no counterbalance in the adjudications of our own courts, I should feel bound to follow the two or three cases which support the plaintiff's claim, and leave reforms to the legislature. But those cases conflict, in principle, with many other decisions in this state, and cannot be supported.

Although the rule is different in England in relation to admissions concerning partnership transactions, *Wood vs. Braddick*, 1 Taunt. 104, it has been settled by a series of adjudications in this state that the authority of partners to bind each other by any undertaking or admission, even though it relate to partnership transactions, ceases with the partnership. In *Hackley vs. Patrick*, 3 Johns. (N. Y.) 536, although it was mentioned in the notice of dissolution that Hastie, one of the partners, would adjust the unsettled business of the partnership, it was held that his subsequent admission of a balance due from the firm to the plaintiffs on account would not bind his copartner. The court said it was "a clear case. After a dissolution of a copartnership the power of one party to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note in the name of the firm or any other act." This doctrine was reasserted and applied in *Sanford vs. Mickles*, 4 Johns. (N.

Y.) 224, where it was held that a partner to whom authority had been given on the dissolution to collect and pay debts, could not indorse a promissory note belonging to the firm so as to pass the title to the indorsee. See *Yale vs. Eames*, 1 Met. (Mass.) 486. In *Walden vs. Sherburne*, 15 Johns. (N. Y.) 409, it was again decided that the admission by one of the partners, after a dissolution, of a balance against the firm, did not bind the other partner. And where the notice of dissolution stated that the business would be settled by one of the partners, who was duly authorized to sign the name of the firm for that purpose, it was held that such partner could not renew a note previously given by the firm, and which was running in the bank at the time of the dissolution. *National Bank vs. Norton*, 1 Hill (N. Y.) 572. *Mitchell vs. Ostrom*, 2 Id. 520, asserts the same general doctrine. And in *Baker vs. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508, the rule that one partner, after a dissolution, cannot bind his fellows by an admission relating to partnership transactions, was sanctioned by the unanimous judgment of the court for the correction of errors.

Enough has, I think, been said to justify the remark, that the two or three cases on which the plaintiff relies cannot be supported. They conflict in principle with a series of decisions spreading over a period of forty years, and including a determination of the court of last resort.

But this is not all. Since the supreme court first fell into the error of following *Whitcomb vs. Whiting*, the course of decision upon the statute of limitations has undergone a great change in this country, and particularly in this state. At the former period, the statute amounted to little more, in judicial construction, than a ground for presuming the debt paid, which might be rebutted by the mere admission that such was not the fact. But the law is not so now. There must be a promise, a new contract, though founded on the original consideration, to take a case out of the statute. If the promise is not express, the case must be such that it can be fairly implied. There must, at the least, be a plain admission that the debt is due, and that the party is willing to pay it. *Allen vs. Webster*, 15 Wend. (N. Y.) 284; *Stafford vs. Richardson*, Id. 302; *Bell vs. Morrison*, 1 Pet. (U. S.) 362. It is the new promise and not the mere acknowledgment that revives the debt and takes it out of the statute. *Roosevelt vs. Mark*, 6 Johns (N. Y.) Ch. 290.

This doctrine is sustained by many decisions in other states, but I do not think it necessary to cite them.

The case of *Whitcomb vs. Whiting* has, to a limited extent, been followed in Massachusetts: *Cady vs. Shepherd*, 11 Pick. 400, 22 Am. Dec. 379; *Bridge vs. Gray*, 14 Id. 55, 25 Am. Dec. 358; *Sigourney vs. Drury*, Id. 387, 391, 392; *Vinal vs. Burrill*, 16 Id. 401. In Connecticut: *Bond vs. Lathrop*, 4 Conn. 336; *Coit vs. Tracy*, 8 Id. 268; *Austin vs. Bostwick*, 9 Id. 496; *Clark vs. Sigourney*, 17 Id. 511, 20 Am. Dec. 110. In Maine: *Parker vs. Merrill*, 6 Greenl. 41; *Pike vs. Warren*, 15 Me. 390; *Dinsmore vs. Dinsmore*, 21 Id. 433; *Shepley vs. Waterhouse*, 22 Id. 497; and in Vermont: *Joslyn vs. Smith*, 13 Vt. 353; *Wheelock vs. Doolittle*, 18 Id. 440. But I think that the judgment under review would not be upheld in either of those states.

In North Carolina it has been held that the acknowledgment of the debt by one partner, though after the dissolution, will prevent the operation of the statute. *McIntire vs. Oliver*, 2 Hawks 209, 11 Am. Dec. 760. And the same has been decided in Georgia, providing the new promise is made before the action is barred, but not when the new promise is made afterwards, as it was in the case before us. *Brewster vs. Hardeman*, Dudley 138. It has been decided by the court of appeals in South Carolina, that a promise by one partner, made after the dissolution, and after the statute had run, will not charge the other partner. *Steele vs. Jennings*, 1 McMull. 297. In the *Exeter Bank vs. Sullivan*, 6 N. H. 124, the authority of *Whitcomb vs. Whiting* was wholly denied, and the court held that a payment by one of the joint makers of a promissory note did not take the case out of the statute as to the other. In Alabama, a promise by the principal debtor will not revive the demand against a co-debtor, who is a surety. *Lowther vs. Chappel*, 8 Ala. 353, 42 Am. Dec. 643. In Tennessee, a promise by one partner after the dissolution of the partnership, to pay a note made by the firm, does not take the case out of the statute of limitations as to the other partner. *Belote's Ex'rs vs. Wynne*, 7 Yerg. 534; *Muse vs. Donelson*, 2 Humph. 166, 36 Am. Dec. 309. This is also the rule in Pennsylvania. *Levy vs. Cadet*, 17 Serg. & R. 126, 17 Am. Dec. 650; *Searight vs. Craighead*, 1 Pen. & W. 135. It is also held in Indiana, that the power of one partner to bind the other by the admission of a debt ceases with the partnership. *Yandes vs. Lefavour*, 2

Blackf. 371. And in *Bell vs. Morrison*, 1 Pet. 351, the supreme court of the United States followed the decisions in Kentucky, and held that the dissolution of the partnership put an end to the authority of the partners to bind each other by any new engagement, and consequently that the acknowledgment of a debt by one partner, after the dissolution, would not take the case out of the statute of limitations. The elaborate argument of Mr. Justice STORY, who delivered the opinion of the court, covers the whole field of discussion, and stands on principles. which, though they may be disregarded, cannot be overthrown.

I have not stopped to inquire whether the statute operates upon the debt or the remedy, for though this might be a point to be considered in a court of conscience, it is of no practical importance in a court of law. We are not dealing with moral, but with legal obligations, and it is idle to talk of a debt where there is no legal obligation to pay it.

I am of opinion that the judgment should be reversed, and that judgment should be rendered for the defendants on the verdict.

JEWETT, C. J., also delivered a written opinion in favor of reversal.

And thereupon the judgment of the supreme court was reversed, and judgment awarded for the defendants on the special verdict.

NOTE: Compare with the three cases following. See also a valuable note to the above case in 51 Am. Dec. 330. Three several views are represented in the cases. One—that of the reasoning in the principal case—that one partner cannot after dissolution bind the others by a new promise; another—that of the following case—that he may do so if the statutory period has not yet elapsed; and a third—held in a few cases—that he may bind the others notwithstanding the operation of the statute, as in *Wheelock vs. Doolittle*, 18 Vt. 440, 46 Am. Dec. 168. The last view held at one time in North Carolina has there been changed by statute. See Parsons on Partnership, 4th Ed. p. 160, where the authorities are collected.

## PENNOYER vs. DAVID.

*Supreme Court of Michigan, 1860.*

8 Mich. 407.

This action was brought against James I. David and James Campbell, as survivors, etc., of Daniel C. Vreeland, who together, during the summer of 1855, constituted a partnership, which was dissolved by the death of Vreeland, in November of that year.

The declaration was upon an account stated, to prove which "plaintiff offered evidence that in December, 1855, after the dissolution of the firm by the death of Vreeland, defendant Campbell accounted with plaintiff, and admitted that there was a final balance of $507 due the plaintiff. Various items entered into this account on both sides, spreading over the time from May to December; some of them on both sides being items that accrued after the death of Vreeland. The defendant objected to the evidence," and thereupon the circuit judge reserved for the opinion of this court the following questions:

1st. Can one partner, after the dissolution of the copartnership, bind the surviving copartner by his admissions?

2d. Is the admission, by a surviving partner, of a balance in an account, of which some items accrued after the dissolution, evidence of an account stated against a surviving copartner, who has neither before nor since such settlement authorized or confirmed the same?

*J. M. Howard*, for plaintiff.

*Hand & Hall*, for defendants.

CHRISTIANCY, J. In reply to the first question propounded, we think it is well settled, both upon principle and authority, that one partner, after dissolution of the firm, cannot, by his admission or contract, create a new partnership liability, nor, for a like reason, can he, by his admission, revive a claim against the firm which has been barred by the statute of limitations, since this is equivalent to a new contract.

On the other hand, with the exception of claims barred by the statute of limitations, and others coming within a similar reason, we think it equally clear in principle, that the admission of one partner, made after such dissolution having reference to previous actual partnership dealings or transactions, stands upon the same ground, and is evidence against the firm in like manner as if made before such dissolution. The dissolution cannot destroy the joint liability of the partners, nor alter their relations to third persons in respect to contracts made or transactions which occurred before the dissolution. The dissolution operates upon future, not upon past transactions. As to persons whose claims have been contracted on the credit of the firm, the partnership, for all substantial purposes, continues till such claims have been satisfied. And persons who have had dealings with the firm during its continuance, are, as to all matters touching such dealings, entitled to the same benefit from the admissions of a single partner, whether made before or after the dissolution, unless shown to be false or fraudulent in fact. See *Wood vs. Braddick*, 1 Taunt. 103; *Lacy vs. McNeale*, 4 D. & R. 7; *Cady vs. Shepard*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Vinal vs. Burrill*, 16 Pick. (Mass.) 401; Coll. on Part. (Perkins Ed. of 1848) sec. 546 and cases cited; Story on Part. sec. 328; see also *Mann vs. Locke*, 11 N. H. 246, where the principles upon which such admissions are receivable are very clearly and ably presented.

But it is objected that the power of a single partner, in such case, to make an admission of a previously existing liability, involves the power of creating a new liability where there had been no previous dealings with the firm, and no such prior liability existed in fact. It was doubtless this supposed difficulty which led the courts of New York, and a few others which have followed their authority, to take the broad ground excluding such admissions altogether. But the rule which entirely excludes such admissions leads to another inconsistency, no less obvious than that which is sought to be avoided by it. Thus, the same courts which deny all power of one partner, after dissolution, to bind his former partners by the admission of a previous liability, yet hold that he may liquidate a previous account (*McPherson vs. Rathbone*, 11 Wend. [N. Y.] 96, 99), and that "if there be no agreement to the contrary, it may be presumed that each partner still has authority to

dispose of the partnership property, to collect, adjust, and pay debts, and to give proper acquittances" (per BRONSON, J., in *Van Keuren vs. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322, *ante*.

Now the power to liquidate a previous account against the firm, to adjust and pay debts, and to give acquittances, would seem necessarily to involve, if not to rest upon, the power to make an admission of the correctness of the account liquidated, and the amount of the debt paid or adjusted. And where (as is generally the case) there are mutual accounts in favor of and against the firm, the power to adjust, and to give a valid acquittance or receipt for the amount found due the firm, necessarily, we think, rests upon the power to state an account, and to admit the claims against the firm. If he has power to state an account, and to agree upon a balance when that balance is in favor of the firm, upon the same principle he must have the like power when the balance happens to be against it. Without the power to admit a previous liability against the firm, we can see no principle on which a receipt or acquittance, in such case, could be admissible evidence against the firm.

But the admission by a single partner, after dissolution, of a pre-existing partnership liability, must be confined to cases where there have been, in fact, previous partnership dealings with the plaintiff, or some transaction of the firm out of which a liability to the plaintiff might have originated; and the fact that there have been such dealings, or such transactions, must be shown by some general evidence at least, outside of the admission itself, otherwise the objection that the power to admit a previous liability involves the power to create a new one, would be insurmountable. But if such evidence be given, it lays a proper foundation for the admission, as it brings the subject matter within the power of a single partner to make an admission in respect to a liability which may have grown out of such previous dealings or transactions, and the balance that may have resulted therefrom. The admission is thus shown to have reference to transactions which took place during the existence of the firm, and as to which the dissolution could not alter the relations of the parties. We think this very clear in principle, though we have been referred to no authorities, and none have come under our observation,

directly in point for a case like the present. See, however, for an analogous rule, 3 Kent Com. (3d Ed.) 50, and cases there cited, especially *Smith* vs. *Ludlow*, 6 Johns. 267, and *Cady* vs. *Shepard*, above cited.

In the case before us, there does not appear to have been any evidence, aside from the admission of one of the surviving partners, tending to show any partnership dealing or transaction with the plaintiff during the existence of the firm. The first question propounded must therefore, as it applies to the present case, be answered in the negative. This, in our view, disposes of the case, and the second question propounded becomes abstract or hypothetical, and requires no answer.

The other justices concurred.

NOTE: See Mechem's Elem. of Partn., § 273.

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## WILSON vs. WAUGH, *et al.*

*Supreme Court of Pennsylvania, 1882.*

101 Pa. St. 233.

The facts are stated in the opinion. Suit was begun on December 13, 1880.

MR. JUSTICE GREEN delivered the opinion of the court.

In delivering the opinion of this court in the case of *Reppert vs. Colvin*, 12 Wr. 248, Mr. Justice Read on p. 252 said: "The law is well settled that after the dissolution of a partnership the partners cease to have any power to make a contract in any way binding on each other. The dissolution puts an end to the authority, and operates as a revocation of all power to create new contracts. Of course a new promise of which the original debt is the only consideration, by a partner after the dissolution of the copartnership, will not take the debt out of the statute of limitations so as to make the copartners liable. The exception to this rule is when the partner takes the stock on hand and becomes the liquidating partner, as in the case of *Hauser vs. Irvine*, 3 W. & S. 345." The authority of Smith

in that case, says Chief Justice Gibson, "was to settle partnership debts and pay them out of the effects in his hands."

That this is the well understood law of this Commonwealth cannot be disputed. It has been expressed so many times that a repetition of the authorities is unnecessary. Generally there is but little difficulty in its application to the facts of a given case. In the present case however the facts are somewhat peculiar. The original debt was for a bill of merchandise sold by the plaintiffs to a firm composed of R. M. Waugh, M. J. Jack and E. H. Jack, called Waugh, Jack & Co. The goods were sold during the year 1873 and the debt became due on November 3d, 1873. On December 11th, 1873, the interest of R. M. Waugh in the firm was sold by the sheriff under an execution against him to one Marriett, who immediately assigned it to M. J. Jack and E. H. Jack, and these persons thereafter conducted business at the same place under the firm name of Jack & Co. On February 17th, 1874, a settlement took place between the plaintiffs and M. J. Jack, of the claim against the old firm of Waugh, Jack & Co. The plaintiff, H. M. Wilson, testified that at that time he received a payment of $25.21 on the account, and it was proved, and not denied, that he took also a note of the new firm of Jack & Co. for $1,500 for the remainder of the claim. Wilson said he took it expecting it to be paid. As to the payment of $25.21 Wilson said he received it but did not know who was present at the settlement. Waugh said that no money was paid in his presence that he saw, and Jack said that he did not remember of any money being paid No one testified that any money was paid in Waugh's presence The court below charged that the partnership was dissolved by the sheriff's sale of Waugh's interest in the firm in December, 1873, that after the dissolution the remaining partners could not bind him by an acknowledgment of, or promise to pay, the debt, that there was no evidence of any promise by Waugh to pay it after it became due and if the jury so found they should render a verdict for the defendant Waugh. Was there any error in this? It is certainly true that the firm was dissolved by the sale of Waugh's interest: *Story on Partnership*, secs. 311, 312, 313; *Parsons on Partnership*, p. 400; *Horton's Appeal*, 1 Harr. 67. *In Est. of Davis & Desauque* 5 *Whart.* on p. 539, Rogers J. said: "There are various ways of dissolving a partnership: effluxion of time; the death of one

partner; the bankruptcy of one, which operates like death; or a dry, naked agreement that the partnership shall be dissolved." In *Levy vs. Cadet*, 17 S. & R. 126, and in many cases since, it was held that after the dissolution of a partnership one partner cannot, by his acknowledgment, revive a partnership debt so as to deprive the other partner of the benefit of the Act of limitations. It is also true, however, that this rule is subject to the exception that one who is a liquidating partner may, after dissolution, bind his former partner by either an acknowledgment, or an express promise to pay, so as to take the debt out of the statute: *Fulton vs. Central Bank of Pittsburg*, 11 Norr. 112; *Reppert vs. Colvin*, supra.

Nor is it necessary that there should be an express and specific appointment of one as liquidating partner. His authority may be inferred from acts done in liquidation, with the knowledge and consent of his former partners: Ibid. In the present case there was no evidence that M. J. Jack was a liquidating partner by any express authority to that effect. There was no evidence that he ever settled any other claim than this one, against the old firm, or that he ever undertook or agreed to do so. In fact the firm of Jack & Co. also became insolvent a few months later, in June following. When Jack settled this claim he did not give the paper of the old firm, but of Jack & Co. Hence no inference can be drawn that he intended thereby to keep alive the debt of the former firm. Indeed Jack testified that the note of Jack & Co. was given and accepted as absolute payment of the debt and that he took a receipt for the debt. Wilson denied having agreed to discharge Waugh but did not deny giving the receipt. But however that may be, it is clear that no inference can be drawn from such a settlement as this, that Waugh was assenting to any promise, engagement or acknowledgment of the debt as a continuing partnership obligation. Moreover, he no longer had any ownership of the partnership goods and was not at liberty to dissent from the control and disposition of them by Jack & Co.

Consequently no inference of assent to their possession and appropriation of them can be derived from the absence of any dissent on his part. He of course was liable for the debt due the plaintiffs during six years from its maturity, but that was the extent of his involuntary responsibility. If M. J. Jack had at the settlement given to the plaintiffs a note for the $1,500, in the name of the old firm of Waugh, Jack & Co., there would

have been an inference that, so far as he was concerned, he intended to continue the obligation of the old firm, and therefore of Waugh as a member of it. In that event the question would fairly have arisen as to his power to make Waugh liable by such an instrument. But he did not do that, and hence so far as the giving of that note is concerned, the inference would be, not that he intended to preserve Waugh's liability or that of the old firm, but to substitute for it a new and different liability, to wit, that of the new firm of Jack & Co., of which Waugh was not a member. The plaintiffs were under no obligation to accept such a note, and if they had refused it and insisted upon a note of the old firm it would have been apparent that they intended that the old firm should remain liable. But nothing of that kind took place. If again it had been proved that the alleged payment of $25.21 on account was made in Waugh's presence and with his knowledge and consent, there would have been some, though not a conclusive, basis for an inference that he assented to such a continuation of the liability of the old firm as would flow from a payment on account. But there was no such proof, and hence there is no authority for such an inference. As we have seen by the decided cases, the power of one partner to bind another, after dissolution, by either an express or implied promise is exceptional. The facts which give rise to it must appear in any case where it is claimed to exist. If they do not appear it does not exist and the general rule of non-liability applies and controls. In the present case there was no express authority to Jack to act as liquidating partner, there was no implied authority from his actually undertaking the settlement of the affairs of the firm because there was no proof of such an undertaking, there was no implied assent to any continuation of the debt by the giving of the note of Jack & Co. for it, and there was no assent expressed or implied to any payment on account of the debt, since there is no evidence that such payment was made in Waugh's presence or with his knowledge or consent.

In these circumstaces there is absolutely nothing upon which to found any legal obligation on the part of Waugh to pay the debt in suit within six years before suit brought and hence the plea of the statute of limitations was a good plea, and there was no error in the instructions given by the court.

Judgment affirmed.

NOTE.—See Mechem's Elements of Partn., § 272.

## FEIGLEY vs. WHITAKER.

*Supreme Court of Ohio, 1872.*

22 Ohio St. 606, 10 Am. Rep. 778.

Action by Whitaker against Feigley, as the survivor of Feigley & Davis, to recover for money loaned. On the trial, in the court of common pleas, the plaintiff offered testimony tending to prove that, in the year 1865, the firm of Feigley & Davis was doing business as merchants and produce dealers at New Lexington, Ohio; that the business of the firm was under the general management and control of James E. Davis, one of the members of the firm; that the defendant, the other member, resided at Cincinnati, and occasionally visited their place of business; that, during the summer of 1865, the plaintiff was engaged in buying wool at said town; that he kept his wool money on deposit with Feigley & Davis, and took in the wool purchased by him at their store, where the money was paid to the plaintiff's customers by Davis, who also adjusted their accounts; that plaintiff purchased wool on commission for Cone & Rickley, of Columbus, and that the firm of Feigley & Davis received a portion of his commission for their services and the use of room; that the firm of Feigley & Davis was dissolved in September, 1865, and that plaintiff, about the same time, quit the purchasing of wool; that the firm of Feigley & Davis was succeeded by the firm of Feigley, Davis & Co., composed of the partners of the old firm and one Perry A. Edington; that the new firm continued the same business, and was under the charge of Davis. No settlement was shown to have been made, between the plaintiff and Feigley & Davis, before the dissolution of the firm. Davis died in August, 1866. The plaintiff also offered testimony to show that after the dissolution of the firm of Feigley & Davis, and both before and after the death of Davis, he had in possession a statement, in the handwriting of Davis, as follows:

"February 15, 1866. Feigley & Davis, to J. C. Whitaker. Dr. To wool money, $200."

To the introduction of the testimony touching this statement, the defendant excepted. No testimony was offered by the defendant.

Thereupon, the defendant asked the court to charge the jury, that if they should find that Whitaker did have in his possession a paper writing in these words: "February 15, 1866. Feigley & Davis, to John C. Whitaker. Dr. To wool money, $200," which was written by Davis, after the firm of Feigley & Davis had been dissolved by the introduction of Edington, a new member, the same cannot be regarded, and it is not evidence to be considered by the jury of an indebtedness to Whitaker and against Feigley, which charge the court refused to give, but did charge that it was competent, but not conclusive, to charge the other party; and further asked the court to charge the jury "that if they should find that after the dissolution of the firm of Feigley & Davis, and Feigley no longer a member of the firm, Davis made any acknowledgments, or admissions or statements, of an indebtedness of the late firm to the plaintiff, the evidence could not be regarded by them, as a late partner cannot bind the old members of the firm by any admissions after the dissolution," which the court refused to charge, but did charge that the same was competent, but not conclusive.

The bill of exceptions also showed that, after verdict, the defendant moved for a new trial, upon the ground, among others, that the court erred in refusing to charge the jury that said paper writing "was not evidence of an indebtedness of said firm to Whitaker, even if in the handwriting of one of the firm; and in charging that the same was an item of evidence to go to the jury, to be considered by them, and upon which they might render a verdict or not, according as they might be of opinion that said paper writing was sufficient or insufficient, in connection with other testimony upon which to found a verdict in favor of, or against, the plaintiff."

*Kelly & Marsh*, for plaintiff in error.

*Lyman J. Jackson*, for defendants in error.

McILVAINE, J. (After stating the above facts continues.) The rulings of the court below must be reviewed in the light of the whole case, as developed in the record. The principal question thus presented is, whether or not the admission of a partner, made while engaged in the adjustment of unsettled partnership business, but after the dissolution of the firm, can

be used as evidence to charge the other partners in relation to such business?

Reported cases upon this subject are in conflict with a majority, perhaps, apparently in support of the negative of the proposition. But when considered in the light of what we conceive to be the true rule, the weight of authority, we think, is in favor of the affirmative.

It cannot be disputed that the implied authority of a general partner to bind his copartners to any new engagement, contract, or promise, although within the scope of the partnership business, is absolutely revoked by the dissolution of the partnership.

But it is nevertheless true, when not otherwise agreed upon, that an implied authority continues in each partner after the dissolution to act for himself and his copartners in the matter of winding up and adjusting the business of the firm; and while acting within the scope of such limited authority, we can see no reason why the several members of the firm should not be bound by the acts and admissions of each other, as in other cases of agency. The maxim, *qui facit per alium facit per se*, should apply in its full force.

Doubts may often arise in particular cases as to whether or not a particular act or admission falls within or without the scope of such limited authority. But it is quite clear to our minds that the settlement of mutual accounts, pre-existing between the firm and its customers, and the adjustment and ascertainment of balances on claims and demands in favor of and against the firm, are within the scope of such agency.

We do not think that a paper writing, made by a partner after dissolution of his firm, and purporting to be a statement of accounts between the firm and a stranger, or of a balance due him, would alone constitute even *prima facie* proof of indebtedness against the other partners. But with proof *aliunde* that an account was current between such persons and the firm before and at the time of its dissolution, such statement would be admissible as tending to prove the state of accounts between them at the date of the dissolution. Or, if proof be made of certain dealings between the firm and a third person, unsettled at the time of the dissolution, then an act or admission made by a partner after the dissolution, if made in the matter of adjusting such business, is competent to be given

in evidence for the purpose of proving a claim founded on such dealings, against all the partners.

In *Wood vs. Braddick*, 1 Taunton 103, MANSFIELD, C. J., said: "Clearly the admission of one partner, made after the partnership had ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners, with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved, his account of their joint contracts should cease to be evidence?" And HEATH, J., said: "Is it not a clear proposition that when a partnership is dissolved, it is not dissolved, with regard to things past, but only with regard to things future?"

Though it is not necessary in this case to approve, to the full extent, the doctrine of *Wood vs. Braddick*, it is nevertheless true that the rule of that case is fully approved by all the English common law decisions, and is adhered to in many American cases. See *Joslyn vs. Smith*, 18 Vt. 353; *Parker vs. Merrill*, 6 Greenl. (Me.) 41; *Mann vs. Locke*, 11 N. H. 246; *Cady vs. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Gay vs. Bowen*, 8 Metc. (Mass.) 100; *Brewster vs. Herdeman*, Dudley (Ga.) 138; *Wilton vs. McNeile*, 4 Dowl. & Ry. 7; *Pritchard vs. Draper*, 1 Russ. & My. 191; *Whitcomb vs. Whiting*, 2 Doug. 652; *Jackson vs. Fairbank*, 2 H. Bl. 340; *Shelton vs. Cocke*, 3 Munf. (Va.) 191; *Simpson vs. Geddes*, 2 Bay (S. Car.) 533. See, also, *Smith vs. Ludlow*, 6 Johns. (N. Y.) 267; *Bridge vs. Gray*, 14 Pick. (Mass.) 55, 25 Am. Dec. 358; and *Hackley vs. Patrick*, 3 Johns. (N. Y.) 536.

It must be admitted, however, that the broad doctrine of *Wood vs. Braddick* has been disapproved in many American cases, especially by the courts of New York, Kentucky, Illinois, Indiana and Missouri; and also by the supreme court of the United States in *Bell vs. Morrison*, 1 Pet. 351. But it will be observed that no well considered case, either in England or America, has denied that, in the absence of express stipulation to the contrary, an implied authority after dissolution is continued in the several partners to wind up the unsettled affairs of the partnership.

In *Bell vs. Morrison*, it is expressly declared that "each partner may, therefore, bind the partnership by his contract in

the partnership business; but he cannot bind it by any contract beyond those limits. A dissolution, however, puts an end to the authority. By force of its terms it operates as a revocation of all power to create new contracts, and the right of the partner can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified and restrained by the express delegation of the whole authority to one of the partners."

This case (*Bell vs. Morrison*), is much relied on as an authority against the power of a partner, after dissolution of the firm, to bind his copartners, by his act or admission, in any transaction whatever. The question decided arose on a plea of the statute of limitations, and we think the doctrine of the case is by no means as broad as that contended for. Justice STORY, in delivering the opinion said: "The question is not as to the authority of a partner, after dissolution, to adjust an admitted and subsisting debt (we mean, admitted by the whole partnership, or unbarred by the statute); but whether he can, by his sole act, after the action is barred by lapse of time, revive it as against all the partners, without any new authority communicated for that purpose. We think the proper resolution of this point depends upon another; that is, whether the acknowledgment or promise is deemed a mere continuation of the original promise, or a *new contract* springing out of, and supported by, the original consideration. We think it is the latter." And again, he says: "The light in which we are disposed to consider this question is, that after a dissolution of a partnership no partner can *create* a cause of action against the other partners, except by a new authority communicated to him for that purpose. * * * When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action, to revive a debt which is extinct." There is nothing in this decision that conflicts with the rule we have stated. And it may be said that most of the cases relied upon as supporting a contrary doctrine arose in the same way, and were decided upon the principle that an acknowledgment or promise to pay a debt, barred by statute of limitations, does not revive the old debt, but creates a new

one; and hence it is, that we stated above that the decided weight of authority is, that a partner, after dissolution, to the extent that is necessary to settle pre-existing claims against the firm, may so exercise his authority as to bind all the partners; but never, without new authority from them, can he create a new cause of action against them.

The court in *Palmer vs. Dodge*, 4 Ohio St. 21, 62 Am. Dec. 271, held that the dissolution of a partnership worked an absolute revocation of all implied authority in either of the partners to bind the other to *new engagements or promises*, made with persons having notice of the dissolution, although springing out of, and founded upon, the indebtedness of the firm; and in *Myers vs. Standish*, 11 Ohio St., 29, it was held, that under an averment of due demand and notice of the dishonor of a bill of exchange, drawn by a firm, the declarations of one of the partners made after dissolution (no notice, however, of the dissolution having been given to the payees), showing an acknowledgment of liability thereon, and a promise to pay the amount of the bill, were admissible in an action against the other parties. But in each of these cases the doctrine is distinctly affirmed, that while the dissolution revokes the implied authority of each partner to incur *new* obligations for his fellows, it leaves upon each the duty, and continues to each the right of doing whatever is necessary to collect the claims due the partnership, and to adjust, settle, and pay its debts. And it is said in *Palmer vs. Dodge*, that "this right of each of the partners to participate in the settlement of its concerns, can not be interfered with by his copartners without subjecting them to the controlling power of a court of equity."

The ascertainment of the amount due to or from the partnership, on account of unsettled transactions, is a necessary step in the winding up of its affairs, and within the authority vested by implication in each partner after dissolution.

We are, therefore, of opinion that the testimony objected to by the plaintiff in error was competent, and that the jury, having found from other testimony in the case, that, at the date of the dissolution of the firm of *Feigley vs. Davis*, there were unsettled dealings between the plaintiff and the firm, and that the paper referred to was made by Davis upon the settlement of such dealings, were authorized to find the amount due the plaintiff thereon from the admission of Davis so made.

It may be proper to add that the proof in this case did not strictly conform to the allegations in the petition, but as no objection has been made upon the ground of variance, we do not deem it our duty to consider that question.

Judgment affirmed.

NOTE: See Mechem's Elem. of Partn., § 272.

Compare with the three cases preceding. There is much conflict of authority in the United States respecting the rule of *Wood vs. Braddick*, See the authorities collected in Parsons on Partnership, 4th Ed., pp. 162, 163.

# XIV.

# AGREEMENTS BETWEEN PARTNERS AT DISSOLUTION RESPECTING PAYMENT OF DEBTS.

## COBB vs. BENEDICT.

*Supreme Court of Colorado, 1900.*

27 Colo. 342, 62 P. 222.

Error to district court, Arapahoe county.

Action by James F. Benedict against Charles E. Cobb. Judgment for plaintiff, and defendant brings error. Affirmed.

The parties to this action, with one Wilson, were formerly engaged in business as partners. Benedict claims that October 1, 1891, his copartners purchased his interest in the firm, for which they agreed to pay him the sum of $10,000, and other considerations. He brought an action to recover the balance of the money consideration, basing his right thereto upon the foregoing statement, and claims that such balance is the sum of $2,500. The defendant Cobb alone answered, by which he tendered (1) the legal defense of payment; (2) the equitable defense that the partners have never settled and adjusted their partnership affairs as between each other; and prays for an accounting.

The averments upon which these defenses are based are denied by replication. The issues thus formulated were submitted to a jury. The evidence of Benedict was to the effect that Cobb & Wilson purchased his entire interest in the partnership business, and assumed all the obligations of the firm. When this transaction occurred, there was standing to his credit on the books of the firm the sum of $3,723.48. This item consisted of the balance of his share of the profits of the business,

which had been divided and placed to his credit, and money belonging to him individually, for which he had been given credit on the books of the firm. Regarding this credit he stated, in substance, that when the sale of his interest was made it was distinctly understood, between Cobb and himself, that he reserved the privilege of withdrawing that sum. As to the agreement of purchase, the statement of Wilson is that the subject of Benedict's liability, as between themselves, for the old firm debts, was not mentioned. He also states he did not understand that Benedict's individual account was included in the purchase. Cobb states, in substance, that when the agreement of purchase was made nothing was said about Wilson and himself assuming the then existing liabilities of the firm.

On the subject of Benedict's individual account he says that he never disputed his right to withdraw the sum it represents, provided it was collected from the assets of the old firm. Plaintiff received a sum largely in excess of $10,000, $7,500 of which he applied on the purchase price for his interest in the assets and business of the firm, and the remainder upon the account standing to his credit at the time of the sale. These payments were made at different times, and in different amounts. As to one of $2,500 it is claimed that when he requested a payment at the time this was made he asked for the balance of the purchase price. The only evidence on this subject is his own, which, when analyzed, is to the effect that he asked for the balance of his account, which, according to his claim, included the balance of the purchase price and the amount due him on his private account. Of this sum he applied $2,000 on the latter, which discharged it in full, and the remainder on the purchase price.

Counsel for Cobb, requested the court to instruct the jury to the effect that Benedict was not exonerated from bearing his proportion of the liabilities of the firm as between each member, unless it was expressly agreed between the partners that he should be. This instruction was refused. The court directed the jury that "if one partner sells to his co-partners his interest in a partnership for a certain consideration, and nothing is said further than that, he is not liable to his partners for the debts of the concern." The jury returned a general verdict in favor of plaintiff, and also a special verdict, from which they found as a fact that Benedict, by the terms of the sale of his interest

in the business of the firm, did not transfer his private account then standing to his credit. From a judgment on the verdict, defendant Cobb brings the case here for review on error. The principal errors assigned may be all considered under one head, namely the giving and refusal of instructions noted. It is also claimed that interest should not have been allowed upon the balance of the account.

*W. C. Kingsley* and *W. J. Miles*, for plaintiff in error.

*Alfred Muller*, for defendant in error.

GABBERT, J. (after stating the facts). The main question between the parties is, what was their contract, either expressly or by implication, with respect to the assumption of the liabilities of the firm by Cobb and Wilson at the time they purchased the interest of Benedict? Incidentally there is also presented for determination what their contract was with respect to the account standing to the credit of Benedict on the books of the firm at the time of such purchase. Upon the determination of these questions the rights of the parties principally depend. In determining the main question, we will eliminate for the present the consideration of any arrangement which they may have made regarding the account of Benedict. It is urged, and many authorities are cited in support of the uncontrovertible proposition, that one partner, by arrangement with his co-partners, cannot shield himself from liability to creditors created while a member of the firm. This case, however, does not present that question. We are not called upon to decide how the agreement of sale affected Benedict as to the then existing creditors of the firm, but what their rights are as between each other under that agreement.

The evidence of Benedict is to the effect that Cobb and Wilson assumed all liabilities of the firm as part of the consideration of the purchase of his interest. If this were the only testimony on the subject, we need go no further in discussing this proposition, because the question of how the liabilities of the firm should be discharged by the partners as between each other, upon dissolution, is one which they can arrange between themselves by an express contract. *Tootle vs. Cook*, 4 Colo. App. 111, 35 Pac. 193. According to Benedict's statement, that was what they did. Therefore, if their agreement em-

bodied the terms and conditions which he asserts, there could be no doubt, so far as the payment of the balance of the $10,000 is concerned, but that he would be entitled to recover without respect to what the condition of the affairs of the old firm might be, after disposing of all of its assets, and discharging its liabilities.

The next question presented is, what contract does the law imply in regard to the assumption of the liabilities of the firm by Cobb and Wilson, according to their version of what the terms of the contract of purchase were? Wilson and Cobb both testified that nothing was said by either of the partners about the assumption of the liabilities of the firm at the time they purchased the interest of Benedict. The interest of a partner in the assets of a firm of which he is a member consists of his portion of the residue left after payment of the liabilities of the firm and the adjustment of their partnership claims against each other. 1 Bates, Partn. § 180; 17 Am. & Eng. Enc. Law (1st ed.) 964; *Douglas vs. Winslow*, 20 Me. 89; *Lambert vs. Griffith*, 50 Mich. 286, 15 N. W. 458.

In determining the value of Benedict's interest, all the parties must have adopted this rule of law in ascertaining that value. The sale operated as a dissolution of the partnership. The interest of Benedict in the assets was transferred to Cobb and Wilson. If nothing whatever was said on the subject of the discharge of the then existing liabilities of the firm, all must have contemplated, according to the statement of Cobb and Wilson, that they were to discharge such liabilities. They received the assets. From that source they would expect to discharge the liabilities. It was Benedict's interest in these assets, after the debts were paid, which they purchased. Having assumed the entire control of the property of the firm, and agreed to pay Benedict a sum certain for what, in their judgment, his net interest was worth, it was, in effect, an accounting between the members of the firm of partnership matters, from which it would naturally be inferred that the purchasing partners assume the firm debts. Thereafter the rights of the parties would be governed by their contract of transfer, and no partnership matters were in issue, because, as we have noticed, the sale operated as a dissolution of the partnership, and impliedly adjusted all partnership matters between the members of the firm. *Clark vs. Carr*, 45 Ill. App. 469; *Edens vs.*

*Williams*, 36 Ill. 252. On this branch of the case we conclude that, where one partner sells his entire interest in the assets and business of a firm to his co-partners, for an agreed consideration, and nothing is said regarding the liabilities of the partnership, the presumption is that the purchasing partners, as between themselves and the one retiring, assumed such liabilities. The trial judge correctly instructed the jury on this subject.

Counsel for plaintiff in error contend that, if one partner retires with the consent of his copartners, there is an implied promise on the part of the latter to pay the debts of the firm, and save the one retiring harmless only to the extent of the assets of the firm. In support of this proposition, T. Pars. Partn. (3d ed.) p. *409, is cited. An examination of the cases which the author cites as supporting his text discloses that the facts in the cases in which the above rule has been announced are entirely different from those in the case at bar in this respect: that the retiring partner had not sold his interest in the assets of the firm to those remaining, but to a third party, with their consent. That, of course, would only make them responsible for the debts of the firm to the extent noticed, because the remaining partners were not parties to such sale; nor would such a transaction have the effect of an adjustment of partnership matters as between the members of the firm.

The next, and incidental, question is what the parties agreed upon regarding the account standing to the credit of Benedict at the time of the sale of his interest. The law unquestionably is that, where one partner sells his interest in the assets of a firm to a co-partner, in the absence of any agreement to the contrary, it will be presumed that all former accounts between them growing out of and connected with partnership transactions are adjusted and settled. This applies to debits as well as credits. 2 Bates Partn. § 629; *Norman vs. Hudleston*, 64 Ill. 11; 17 Am. & Eng. Enc. Law (1st ed.) 1109. Such accounts, however, may be the subject of express contract as between the partners. According to the testimony of Benedict, he was to have the right to withdraw the amount of his private account. Wilson states that they did not purchase the individual account of Benedict. On this subject Cobb states nothing futher than to the effect that Benedict was not to be paid the amount of his private account unless it was collected from the assets of the firm.

It appears that, as between themselves, the amount of this account was due Benedict as his share of profits made previous to dissolution, and for individual moneys of which the firm had received the benefit. According to his statement, he was to receive the amount of this account over and above the purchase price agreed upon. The jury found, as a matter of fact, that he did not transfer his private account by the terms of the sale. The evidence certainly warranted this finding. There was a sum largely in excess of $10,000 paid Benedict, which could not have been paid for any other purpose except to apply on this private account; and, as the evidence fully sustains the claim of Benedict that this account was the subject of an express agreement between himself and copartners, it is not necessary to discuss the question further. It only became important in view of the fact that Cobb had pleaded payment of the purchase price, and that part of the payments made, according to the testimony of Benedict, had been applied upon this private account. As his copartners agreed to pay this, he had the right, in the absence of directions to the contrary, to make this application, and it left the balance due him on the purchase price as found by the jury.

Section 2252, 1 Mills' Ann. St., provides that creditors shall receive interest on money due on accounts from the date when the same became due. By the terms of the sale the purchase price was to be paid in cash. Benedict was also to receive from Cobb and Wilson, at the same time, the amount due him as shown by the books of the firm. Each of these items became due on the date this arrangement was effected, and therefore drew interest at the legal rate from that time. The judgment of the trial court is in all respects correct, and it is, therefore, affirmed. Affirmed.

NOTE.—See Mechem's Elem. of Partn., § 274.

## SMITH vs. EDWARDS, *et al.*

*Supreme Court of Tennessee, 1846.*

26 Tenn. 77, 7 Humph. 106, 46 Am. Dec. 71.

Bill in chancery. The facts sufficiently appear in the opinion.

*Trewhitt* and *Gaut*, for the complainant.

*Torbit* and *Montgomery*, for the defendants.

By Court, REESE, J. The complainant and James S. Edwards and John S. Edwards became copartners in a mercantile concern, and after some time, by mutual agreement, in writing and under the seal of the parties, the partnership was dissolved, and the defendants stipulated by their covenant to pay the debts of the concern and indemnify the complainant against said debts and further, to allow him, for his profits, six hundred dollars of his private account on the books of the firm, and the complainant transferred all his interest to said James S. and John S. Edwards. All the former parties were jointly sued at law by eastern creditors. Upon which James S. and John S. sold out the effects of their concern to one Alpheus S. Edwards, their younger brother, a clerk in the store, on credit, taking his own note only; and he for some time conducted business extensively on his own account, bought one thousand five hundred dollars' worth of additional goods, and then sold one-half of the concern to William A. Caldwell, who became his partner. Judgment at law having been obtained against the complainant, the said James S. and the said John S., by the eastern creditors, and the same not having been paid, the complainant has filed this bill for the purpose of reaching specifically and having an account of the effects of the late firm, of which he was a partner, in the hands of any of the defendants, to the end that they might be subject to the satisfaction of claims against the first-mentioned firm. Is the complainant, under the circumstances above set forth, entitled to this? The creditors are not made parties, but that is not material, for merely as

creditors, and before execution levied, they have not strictly any equity against the joint partnership effects; their equity is subordinate to the equity of the partners, and to be worked out through that of the partners (see Story on Part.), while the partnership is solvent and going on. Creditors, therefore, having no lien on such effects, they may for a valuable consideration be transferred *bona fide* to any person, and as well to the other partners as to a stranger: Id., sec. 358. In such a case the retiring partner, who so transfers his share, has no lien on the property for the discharge of the debts of the firm, for by his voluntary transfer thereof he has parted with it, and trusted to the personal security and personal contract of the other partners: Id., sec. 359. This principle is well settled in England: *Ex parte Ruffin*, 6 Ves. Jr. 119, 127; *Ex parte Williams*, 11 Id. 3, 5.

This is the situation of complainant. He dissolved the firm; he assigned his interest for a valuable consideration, and he took the personal covenant of indemnity against the debts of his assignees, the former partners. He does not pretend that this was not done *bona fide*. What lien, after this, can he have against these effects, any more than against the private property and effects of his former partners? They alike belong to them and not to him. If this were not so, business would not be continued by some members who come into a firm upon the retirement of a partner, for to give them both liens upon the effects, which the one may have sold to the other, and taken out his profits and obtained a covenant of indemnity, would be attended with a confusion and inconvenience difficult to be estimated. The plaintiff's claim set up in his bill is barred, therefore, by his own assignment, and acceptance of a personal security in the covenant of indemnity of his partners. He is barred also by the purchase of the effects by Caldwell. There is not any satisfactory evidence to show that this purchase was not fairly made.

Upon both grounds we affirm the decree of the chancellor.

NOTE.—See Mechem's Elements of Partn., §§ 274-276.

## CROONE vs. BIVENS, *et al.*

*Supreme Court of Tennessee, 1859.*

89 Tenn. 191, 2 Head. 389.

The bill was dismissed, on demurrer, by Chancellor Williams, at the February term, 1859. The complainant appealed.

*M. & H. Brown*, for the complainant.

*M. Bullock, Tomlin* and *Stephens*, for the defendants.

WRIGHT, J., delivered the opinion of the court.

The Chancellor dismissed the bill, and amended bill, upon demurrer, and in this, we think, he acted properly.

The case is governed by *Smith vs. Edwards, et al.*, 7 Humph. 106. It is there held that where a partner sells his interest in the partnership concern, either to his copartners, or strangers, he has no lien on the partnership property for the payment of partnership debts, for which he is liable, any more than those against the private property, or effects of his former partners. He cannot pursue specifically, or have an account of the effects of the late firm of which he was a partner, to the end that they might be subject to the satisfaction of claims existing against the firm. And the fact that when he retired his copartners stipulated to pay the debts of the concern, and indemnify him, can make no difference, he having trusted to the personal covenants of his assignees.

Here, the case made is, that complainant, Nathaniel W. Bivens and William H. Stone, were at first partners under the firm name of N. W. Bivens & Co., after which they took in one Emmerson, and the business progressed under the firm name of Bivens, Croone & Co. After this complainant and Bivens purchased out the interest of Stone and Emmerson, and the concern was carried on under the partnership style of Croone & Bivens, until the 8th of January, 1857, when complainant transferred all his interest in said firms to said Bivens

and one Bryan, and placed the assets of every kind in their possession, in consideration of which they in writing stipulated to pay all the outstanding debts against said firms, and to release complainant therefrom.

He retains no interest in, or lien upon, the effects so transferred; nor is there any stipulation that they shall be applied in payment of the partnership debts.

Bivens and Bryan have failed to pay said debts, or to have complainant released, and he has been sued and forced to pay a part of them, and is liable to pay the residue; and the said Bivens and Bryan are insolvent, and are applying the assets so transferred to their own private use.

The object of the bill is to obtain an account of these assets, specifically, to have the firm debts paid and complainant released.

But, as we have seen, upon the authority of *Smith v. Edwards, et. al.*, and the cases there cited, the bill cannot be maintained, and the complainant must look to the personal covenants of Bivens & Bryan.

Neither is there any other aspect in which the case can be maintained. It is a rule, to be sure, that a surety has a right to bring his principal and the creditor into a Court of Chancery, to compel the payment of the debt. But if we were to concede that complainant occupies—toward the creditors of these firms and the defendants—the relation of a surety, yet the bill makes no case under this head of equity. The creditors are not parties, and the case is, in other respects, perhaps, defective. 5 Humph. 66.

Decree affirmed.

NOTE.—See Mechem's Elements of Partn., §§ 274–276.

## MENAGH vs. WHITWELL.

*Court of Appeals of New York, 1873.*

52 N. Y. 146; 11 Am. Rep. 683.

Appeal from a judgment of the supreme court, rendered at a general term in the fourth department, affirming a judgment in favor of the plaintiff, entered upon the report of a referee, in an action for taking and converting personal property.

The property consisted of machinery, utensils, lumber and other chattels formerly owned by the firm of J. C. Smith & Co., and connected with a yeast factory carried on by them. From the 17th of August to the 22d of December, 1866, the firm consisted of John C. Smith, Hollister E. Goodwin, John Wride, Marietta Huntington and William B. Rubert, each being interested to the extent of one-fifth. The firm being indebted to the Geneva National Bank, judgments were recovered on the 24th of May, 1867, against the persons above named, viz.: one for $1,403.83, and one for $237.53. The first-mentioned judgment included claims to the amount of $330, which accrued after the withdrawal of Wride from the firm. Executions were issued on these judgments on the 25th of May, and placed in the hands of the defendant Ringer, who was deputy sheriff of Ontario county, and he levied upon the property on the 19th of July, 1867, and sold it on the 29th of that month. The defendant Whitwell was sheriff, and this action was brought against him and his deputy for such levy and sale.

The plaintiff claimed title to four-fifths of the value of the property, as follows: On the 22d of December, 1866, John Wride assigned all his interest in the property and business of the firm to John C. Smith, who agreed to pay the firm debts; and on the 4th of February, 1867, Marietta Huntington assigned all her interest in the firm property to the said John C. Smith, who took her place in the firm. The business continued to be carried on by the remaining partners, under the same firm name.

Both of these transfers were made with the consent of all the other members of the firm, and in good faith, without intent to defraud the creditors of the firm.

On the 28th of February, 1867, the firm then consisted of Smith, Rubert and Goodwin, and Smith's interest being three-fifths, he gave to the plaintiff a chattel mortgage upon his interest in the yeast factory, property, accounts, etc., of the firm to secure his individual debt to the plaintiff of $2,400, payable in installments in two, five and seven months, with power to take possession and sell in case of default, or whenever she should deem herself unsafe, before default. The referee found that this amount was justly due to the plaintiff for money loaned by her to Smith, which he had used for the firm, and for which it was indebted to him; and that the mortgage was given in good faith, with the consent of all the partners, and without intent to defraud creditors. There was no finding as to the solvency of the firm at the time.

On the 2d of February, 1867, Wm. B. Rubert had given a like chattel mortgage on his one-fifth interest to Samuel E. Rubert, to secure an individual debt of $500, payable in five days. The referee found that this was a just debt for money loaned, and that the mortgage was executed in good faith to secure the debt, and without any fradulent intent.

On the 10th of May, 1867, the plaintiff and Samuel E. Rubert took possession of the property mentioned in their respective mortgages, and, on due notice, it was sold on the 18th of May, 1867, the three-fifths interest of John C. Smith being purchased by the plaintiff for $1,000, and the one-fifth terest of Wm. B. Rubert being bought in by Samuel E. Rubert for an amount less than his mortgage. On the same day, John C. Smith sold and delivered to the plaintiff all his interest in a quantity of lumber, boxes and other material then on the premises, and belonging to the firm, for $200, which was applied in part payment of the plaintiff's mortgage. The referee found that this sale was in good faith, and without any fraudulent intent. This lumber, etc., was levied upon and sold by the defendants, and was embraced in the plaintiff's recovery.

On the same 10th of May, Goodwin, the only remaining member of the firm, transferred his undivided one-fifth interest in the property and business of the firm to Mary B. Goodwin, who still owns the same, but never became a member of the firm.

The only finding of the referee in respect to the solvency of the firm at the dates of these several transactions were, that on the 22d of December, 1866, when Wride withdrew from the

firm, transferring his interest to Smith, the firm was largely indebted and somewhat embarrassed, but was not known or believed to be insolvent by either Wride or Smith; and that on the 4th of February, 1867, when Marietta Huntington transferred her interest, the financial affairs of the firm were about the same as they were on the 22d of December, 1866. That the value of the property and assets of the firm depended in part upon the continuance of its business; and that in case such business was continued, and properly managed, the property and assets were more than sufficient to pay the debts.

The referee further found that, at the time of the seizure and levy by the defendants, the preperty was in possession of the plaintiff and Samuel E. Rubert, and was of the value of $2,150. That the plaintiff was the owner of an undivided three-fifths, and Samuel E. Rubert of one undivided fifth part thereof; and that on the 15th of August, 1867, and before the commencement of this suit, the said Samuel E. duly assigned to the plaintiff all his right to the property and cause of action against the defendants for seizing the same.

And as conclusions of law, the referee found that at the time of the levy neither of the defendants in the execution had any leviable interest in the property, but that it belonged four-fifths to the plaintiff and one-fifth to Mary B. Goodwin; that the bank had no lien thereon, and that the plaintiff was entitled to recover four-fifths of the value, amounting to $1,720, with interest from the time of the conversion.

The plaintiff recovered four-fifths of the value of the property.

*W. F. Cogswell* for appellants.

*E. Countryman* for respondent.

RAPALLO, J. The mortgages executed by John C. Smith and William B. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the *corpus* of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individual debt of the partner, even if effectual as to the firm by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership property, and void, as to the creditors of the firm,

under the principle of the cases of *Ransom vs. Van Deventer*, 41 Barb. 307, and *Wilson vs. Robertson*, 21 N. Y. 587, unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm. The supreme court have considered that the findings of the referee fail to disclose any insolvency, but, on the contrary, establish the solvency of the firm at the time the mortgages were given. We cannot concur in this view of the effect of the findings, but think that the facts found show that the firm was insolvent when the mortgages were given, and if there were any doubt upon that point they clearly establish that the diversion of four-fifths of its properties to the individual debts of two of the partners would make it insolvent.

According to these findings, the firm was, in February, 1867, and had been from December, 1866, largely indebted and embarrassed, and the value of its property, and its consequent ability to pay its debts, depended, in part, upon the continuance and proper management of its business. The mortgages were given on the 2d and 28th of February, 1867. If they were intended to be liens upon the *corpus* of the property, as they have been treated by the referee, and not merely liens upon the surplus which should belong to the partners respectively after payment of the firm debts, it is evident, from the facts stated as existing at the time, as well as from the result, that their enforcement would prevent the firm creditors from collecting their demands out of the firm property, and that, under the principle of the cases cited, they were fraudulent and void as to such creditors. If so, the mortgagees, by purchasing at the sale under the mortgages, acquired no valid title as against such creditors, and the plaintiff was consequently not entitled to recover.

Assuming, however, that the mortgages were intended to pass merely the individual interests of the mortgaging partners in the common stock, and for that reason were not fraudulent as to the firm creditors, then it becomes necessary to consider their legal effect upon the rights of creditors of the firm. It is clear that the remaining partner was entitled to the control of the firm property so long as he retained his interest, and to apply it to the firm debts, and that the mortgagees acquired only a right to the surplus, if any, which would be found to belong to the mortgagors on the settlement of the accounts.

And so long as any of the partners had this dominion over the firm property it can hardly be questioned that it was subject to levy on execution at the suit of a firm creditor. *Lovejoy vs. Bowers*, 11 N. H. 404; *Coover's Appeal*, 29 Penn. St. 9; *Pierce vs. Jackson*, 6 Mass. 243.

But the point upon which the judgment was sustained in the supreme court, at general term, was that after the execution of the mortgages H. E. Goodwin, the only remaining partner, made a separate transfer, to a third party, of his individual interest in the partnership properties, and on this ground it was held that when the execution was levied none of the defendants in the execution had any leviable interest in the property levied upon; and it was further held that the plaintiff, who had purchased the interest of S. E. Rubert, under his mortgage, was entitled by virtue of the two mortgages and of the purchase at the sale under them, to recover the value of four-fifths of the *corpus* of the partnership property levied upon by the defendants, without regard to the partnership debts.

This position is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners divested the title of the firm; that firm creditors have no lien upon the partnership effects, and no direct right to compel their application to firm debts in preference to individual debts. That the right to compel this application is an equity vested in the partners themselves, and exists only as between each other. That so long as this equity exists in any of the partners the creditors have an equity to compel its enforcement between the partners, and may by this means obtain the application of the partnerhip properties to their demands, in preference to the individual debts or separate dispositions of any of the partners; in other words, "that the equities of the creditors can only be worked out through the equities of the partners." From these premises, the conclusions have been drawn that if such equities are waived or released by the partners themselves the creditors lose them, and that a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding that if the individual interests of each of the members of a firm are successively sold under executions against such members, respectively, for their individual debts, the purchasers acquire

the *corpus* of the property, free from the copartnership debts, and the equities of the partners and partnership creditors are extinguished. *Coover's Appeal*,, 29 Penn. St. 9.

The injustice, and it may be said the absurdities, which result from such a view lead to an inquiry into its correctness. A firm may be perfectly solvent though the members are individually insolvent, yet in such a case the doctrine that the property of the firm is divested, and the equities of the partners and partnership creditors are extinguished, by separate transfers of the individual interests of all the partners, might result not only in an appropriation of all the properties of the firm to the payment of the individual debts, to the entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of $300,000, and to owe debts to half of that amount, the interest of each partner, supposing their accounts between themselves to be even, is $50,000. The members of the firm are individually indebted. One of them sells his share, and receives for it $50,000, which is its actual value; the share of another of the partners is sold out under execution, and brings its full value, $50,000. Thus far one partner remains, and he has an equity to have the firm debts paid, and those who have sold out are protected against such debts. The purchasers of the separate interests are entitled to the surplus only; the joint creditors still have their resource against the partnership property and the right to levy on such of it as is subject to sale on execution; but before any levy the remaining partner sells out his individual interest, or it is sold out on execution. According to the doctrine applied in the present case, and maintained in the case of *Coover's Appeal*, supra, the firm property is, by this last sale, relieved from the partnership debts, the two shares first sold are at once changed from interests in the surplus to shares in the *corpus* of the property, free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts is, without any consideration, appropriated by the transferees of the individual interests of the partners.

Such is, in substance, the operation performed in the present case. Assuming that the mortgages are intended to convey only the separate interests of the mortgagors (which, as has been shown, is the only theory upon which they can escape

being regarded as fraudulent), the mortgaged property was, at the time the mortgages were given, liable to be taken for the partnership debts. The mortgages were but a slender security, and their value dependent upon the firm debts being paid. This state of affairs continued so long as Hollister E. Goodwin retained his one-fifth interest in the firm. The firm property was legally under his dominion for the payment of firm debts, and the firm creditors, if they then had their execution, could have rightfully levied upon it, or availed themselves of Goodwin's equity as to any property which must be reached in that form. But on the 10th of May, 1867, Hollister E. Goodwin made a transfer of his interest in the property of the firm to one Mary B. Goodwin, and on the same day the plaintiff and Samuel E. Rubert took possession under their mortgages. The referee has not found what was the consideration or purpose of this assignment from Hollister E. to Mary B. Goodwin, nor has he expressly found that it was made in good faith. But the effect claimed for it is that Hollister E. Goodwin being the only remaining partner, the transfer of his interest divested him of his dominion over the partnership property, and of his equity to require the application of the partnership property to the payment of its debts, and that as the partnership creditors could only reach the property through him, he, by this transfer or surrender of his rights, had cut off their access to it, and thrown it into the hands of the transferees of the individual partners, unincumbered by firm debts.

Waiving any question as to the *bona fides* of this transaction, the referee not having found it fraudulent, and treating the sale of Goodwin's interest as if it had been made under an execution against him, we come back to the question whether the consequences claimed do legally follow from separate sales of the individual interests of the several partners.

It would be a superfluous labor to trace the history of the changes, which have, from time to time, taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine that as between a firm and its creditors the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint-stock until the firm debts are paid and a balance of account is struck between him and his

copartners, and the amount of his interest accurately ascertained.

The *corpus* of the effects is joint property, and neither partner separately has anything in that *corpus;* but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken. *West vs. Skip*, 1 Ves. Sr. 239; *Fox vs. Hunbury*, Cowp. 445; *Taylor vs. Fields*, 4 Ves. 396; 15 id. 559, note; *Pierce vs. Jackson*, 6 Mass. 243; *Doner vs. Stauffer*, 1 Penn. (Penrose & Watts, see p. 164) 198; 2 Kent's Com. (11th ed.) 78, note; Collyer on Part., 3 l Am. Ed. (Perkins), notes to sec. 822, pp. 704 to 710; Story on Part., notes to secs. 261, 263; *Crane vs. French*, 1 Wend. 311; *Witter vs. Richards*, 10 Conn. 37.

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts. 3 Kent's Com. (11th ed.) 76.

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm. 3 Kent's Com. (11th ed.) 78, note b.

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken. 1 Ves. Sr. 241, Am. ed., note; 15 Ves. 557.

No person deriving under a partner can be in a better condition than the partner himself. *Fox vs. Hanbury*, Cowp. 445.

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner, of his undivided interest, cannot avail against the creditors of the partnership who attach the partnership property. *Lovejoy vs. Bowers*, 11 N. H. 404.

These principles have been enunciated in a great number of cases where some one at least of the partners retained his equity to have the firm debts paid, and the rights of the creditors to assets or proceeds, which have come under the control of a court of equity, have been worked out through the equity of that partner. But I find no case in which the consequences of transfers of the separate interests of all the partners to outside

parties has been considered, except the case of *Doner vs. Stauffer*, 1 Penn. (Penrose & Watts) 198, and *Coover's Appeal*, 29 Penn. St. 9, before referred to. In neither of these cases is the point adjudicated, for in both cases the joint creditors intervened before the sale of the interest of the last remaining partner, and their right to priority was sustained; though the opinion of the court was expressed as to what the result would have been if all the individual interests had been first sold.

There is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts in preference to the separate debts of one partner; that is where a *bona fide* sale has been made by a retiring partner, in a solvent firm of two members, to his co-partner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. *Ex parte Ruffin*, 6 Ves. 119; *Dimon vs. Hazard*, 32 N. Y. 65. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is, what is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons? Where the property remains in specie, and no act has been done by the firm to divest its title, but the partners have made separate transfers of their respective individual interests to different persons, is it still to be regarded, as to firm creditors, as firm property, or has it become the absolute property of the several transferees of the interest of the individual partners?

It has been shown that no share in the *corpus* of the property passed by either of these transfers separately, but merely an interest in the surplus, and which should be ascertained on an accounting after payment of the firm debts. But it is claimed that when all the partners have assigned, their interest in the

property is divested, and their equity is destroyed, and therefore the property is released from the debts, and what was at the time of the assignment a share of a contingent surplus, has been converted into a share of the *corpus* of the property. Is this position sound? When a partner sells his interest in a firm to a person other than his copartner, or it is sold on execution against him, does he thereby lose all equity to have the firm debts paid out of the assets?

When he sells to his copartner he relies upon his assumption of the partnership debts, and unless he stipulates for an application of the assets to that purpose he parts with all lien upon them. But when he sells to a stranger not liable for the debts, or his interest is sold on execution, is not the right to have the debts paid out of the property a right of indemnity personal to himself, and which does not pass by the sale? Could it be tolerated that the interest of a partner should be sold under execution against him, on which sale only the value of his interest in the surplus could be realized, and that the purchaser should be allowed to take the *corpus* of the property and leave him liable for the debts? If the legal effect of the transfer were set forth in the instrument, it would be seen that all the purchaser acquired was a right to an account, and to the partner's share in the surplus, after payment of the debts when ascertained, and that he had no right to that part of the property which was required for the payment of debts; that the sale was subject to the debts. 3 Kent's Com. 76–78. The partner whose share was sold would manifestly have an interest in the protection and appropriation of that part of the property in discharge of his own liability to the firm creditors.

I do not see how this right can be affected by the question whether the separate interests of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser, and the partnership assets are the primary fund for their payment. The case differs materially from a sale by a retiring copartner to his copartner, who is personally liable for the debts directly to the creditors; but even such a sale is valid only when there is no

insolvency at the time. To sell to an insolvent partner would be a clear fraud. How much more clearly apparent would be the injury to creditors by a sale to a person not liable for the debts, if such sale had the effect to relieve the property from them.

It can hardly be necessary, where the firm property remains in specie and is tangible and capable of being levied upon, to resort to the equities of the partners in case there has been no transfer by the firm, and the only adverse claimants are assignees of the individual interests of the several partners for their separate debts. The right of the firm creditor to levy on property thus situated can be sustained on two grounds. If the effect of any of these transfers is to divest the title of the firm, then, if effected by the acts of the partner, they are clearly fraudulent and void as to firm creditors, as is shown in the cases of *Ransom vs. VanDeventer*, 41 Barb. 307, and *Wilson vs. Robertson*, 21 N. Y. 587. An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his copartners, is illegal and void, provided the firm is not left with sufficient to pay its debts. How absurd it would be to hold that all of the partners, by making separate assignments of their respective shares in the firm property to their individual creditors, could effectually divest the firm of all its property and apply it to their individual debts, leaving nothing for the partnership creditors. But the simple solution of the question is to hold that the title of the firm, as between it and its creditors, to the *corpus* of the property, or at least to so much of it as is necessary for the debts, is not divested by these separate transfers to strangers.

As is stated by Prof. Parsons in his work on Partnership (chap. 10, sec. 1, pp. 356 to 362, 2d ed.), a partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The well-established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership is derived from the acknowledgement that a partnership is a body by itself. In its relation to its creditors it is placed upon the basis of having its own creditors and possessing its own property, which it applies to the payment of its debts, and after this work is done, there is a resolution of the body into its elements.

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceed-

ings against them individually with reference to their individual interests, should be held to affect the title of the firm so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property, free from the joint debts, would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be divested by the acts of the partners severally, not in the business of the firm, nor by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the *corpus* of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners, separately, than when made by a portion of them; but the property should be deemed to continue in the firm until its title has been divested by some act of the firm.

My conclusion is that, as between the firm of J. C. Smith & Co. and its creditors, the property levied upon by the defendants remained the property of the firm, and subject to levy on execution against it, notwithstanding the transfers by the several partners of their respective individual interests.

I have not adverted to the changes which took place in the firm by the retirement of John Wride and M. Huntington, and the transfer by them of their interests to J. C. Smith, intermediate the contracting of the debt to the Bank of Geneva, and the levy, the effect of these changes being fully considered in the opinion of my learned associate, ALLEN, J.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

ALLEN, J., delivered a concurring opinion.

All concur in both opinions.
FOLGER and ANDREWS, JJ., not sitting.
Judgment reversed.

NOTE.—See Mechem's Elements of Partn., §§ 97, 98 and 238.

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## STAHL, *et al.* vs. OSMERS, *et al.*

*Supreme Court of Oregon, 1897.*

31 Or. 199, 49 P. 968.

Appeal from circuit court, Morrow county; Stephen A. Lowell, Judge.

Suit by Mrs J. H. Stahl and others against Dan Osmers and others. From decree for defendants, plaintiffs appeal. Affirmed.

The object of this suit is to compel the vendees of partnership property acquired from the individual partners to account for and apply the proceeds thereof to the payment of partnership debts. The facts are practically undisputed, and the only controversy is about the application of the law thereto. On July 6, 1893, the defendants Dan Osmers and Mat Hughes were partners in the saloon business at Heppner, and were the owners of a stock of wines, liquors, and cigars of the alleged value of $800, and were insolvent. On that day the partnership property was attached for the individual debt of Osmers at the suit of Reuhl, and under an execution on a subsequently recovered judgment, his interest therein was sold to the defendant William Hughes for the sum of $200. On the day following the attachment, the other partner, Mat Hughes, sold and transferred all his interest in the firm property to the defendant John Hughes for the sum of $600, who, together with the purchaser at the sheriff's sale, took possession of the entire partnership property, and disposed of it for their own use and benefit. The plaintiffs,—who are creditors of the firm of Osmers & Hughes,—having reduced their claims to judgment, and an execution having been issued thereon, and returned *nulla bona*, began this suit on March 10, 1894, to compel the defendants and John Hughes to account for and apply in payment of their judgment the proceeds of the property formerly

belonging to said partnership. The decree of the court below was in favor of defendants, and plaintiffs appeal.

*Frank Kellogg*, for appellants.

*Rea & Lyons*, for respondents.

BEAN, J., (after stating the facts.) The complaint charges fraud in the sale and transfer by the defendant Mat Hughes of his interest in the partnership property to his co-defendant, John Hughes. But this allegation is wholly unsupported by evidence, and therefore the only question for determination on this appeal is whether simple contract creditors of a partnership have such a lien upon the assets of the firm as will enable them to follow and subject such assets, or the proceeds thereof, to the payment of the firm debts after all partners have parted with there interest therein. Upon this question there is some conflict in the adjudged cases, but the great weight of authority favors the doctrine that the firm creditors have no lien in their own right upon the partnership effects, and no direct right to compel their application to firm, in preference to individual, debts. The right to compel such an application of partnership assets is generally regarded as an equity the partners have as between themselves, but, so long as it exists in any of the partners, the creditors may, by a sort of subrogation to the right of the partner, compel its enforcement and by this means obtain an application of partnership property to their demands. The right of the firm creditor in this respect is, however, a derivative one only, and not held or enforced in his own right; in other words "the equities of the creditors can only be worked out through the equities of the partners."

From these premises it necessarily follows that, unless a partner is in condition to enforce such right, the creditors cannot do so. The *quasi* lien, as it is sometimes called, of the creditor, being at best only the resultant of his debtor's lien, it of course cannot exist after the debtor had himself ceased to have any lien from which it could be derived. The leading case upon this subject is, perhaps, that of *Case vs. Beauregard*, 99 U. S. 119, in which it was held that transfers made by the individual members of an insolvent firm of their interest in the partnership assets terminated the equity of any partner to require the application thereof to the payment of firm debts, and was, therefore a complete bar to a bill filed by the partnership

creditors for that purpose. But probably no clearer enunciation of the doctrine is to be found than that of Mr. Justice MATTHEWS in *Fitzpatrick vs. Flannagan*, 106 U. S. 654, 1 Sup. Ct. 374. He says: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it, the application of those assets primarily to payment of debts due them, whenever the property comes under its administration.' Such was the language in this court in *Case vs. Beauregard*, 99 U. S. 119, in which Mr. Justice STRONG, delivering its opinion, continued as follows: 'It is indespensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*.' Hence it follows that 'if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.'"

And in *Schmidlapp vs. Currie*, 55 Miss. 600, the rule is admirably stated by Mr. Justice CHALMERS as follows: "The firm creditors at large of a partnership have no lien on its assets any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-

operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts and individual property to individual debts, is only a principle of administration adopted by the courts where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus, where upon a dissolution of the firm by death or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned shall be applied to the liabilities of its separate owner, so that neither class of creditors shall be allowed to trespass upon the fund belonging to the other until the claims of that other shall have been satisfied. This right of the creditors is, therefore, really the right of their debtors, and inures to them derivatively from the debtors. Hence it is said that the lien or *quasi* lien of the creditor 'is worked out through the partners,' the meaning of which is that the firm creditors may demand the primary application of the firm assets to the payment of their debts, because each one of the partners would have a right to demand this as against his co-partners."

This doctrine is likewise supported by the following authorities: 2 Bates, Partn. § 824; T. Pars. Partn. § 246 et seq. and note; *Huiskamp vs. Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899; *Goldsmith vs. Eichold*, 94 Ala. 116, 10 South. 80; *Jones vs. Fletcher*, 42 Ark. 423; *Woolen Mills vs. Conklin*, 26 Iowa, 422; and many others which it is not deemed necessary to cite. The courts of New York (*Menagh vs. Whitwell*, 52 N. Y. 146), and perhaps those of another state or two, seem to hold to a contrary doctrine, but they are decidedly in the minority, and we are not sufficiently impressed with the soundness of the reasons upon which their decisions are founded to follow them in opposition to what we conceive to be the great weight

of authority. Applying the doctrine stated to the case in hand, the solution is clear. It is admitted by the complaint that the entire right and interest of each of the partners in the firm of Osmers & Hughes in the partnership property had been sold and transferred long prior to the commencement of this suit, and that neither of such partners had any interest therein at the time the suit was commenced, and hence, under the rule stated, it cannot be maintained. The decree must therefore be affirmed, and it is so ordered.

NOTE.—See Mechem's Elem. of Partn. §§ 97-100, 124, 278-288, 285-289.

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## SMITH vs. SHELDON.

*Supreme Court of Michigan, 1876.*

35 Mich. 42, 24 Am. Rep. 534.

**Action by Sheldon against Smith and others, on a partnership indebtedness. Prior to June, 1867, Eldad Smith, Isaac Place and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of nine hundred and sixty-nine dollars on book account.**

**In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his copartners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day, with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered.**

*C. & W. M. Draper*, and *C. I. Walker*, for plaintiff in error.

*Meddaugh & Driggs*, for defendant in error.

COOLEY, C. J. The legal questions in this case arise upon the above stated facts. The position taken by the plaintiffs below was, that as they had never received payment of their bill for merchandise they were entitled to recover it of those who made the debt, the giving of the note which still remained unpaid being immaterial. On behalf of Smith it was contended that, by the agreement between Place and his copartners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as the principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. And it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:

1. Was the note given by Place in the copartnership name for the copartnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And,

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the judgment that when a partnership is dissolved the partner who is intrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand, it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due-bill or I. O. U., we are satisfied that there is no good reason for recognizing in the partner who is to adjust the business of the concern any implied authority to

execute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness; and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future if the partner intrusted with the adjustment of their concerns were authorized to make new contracts.

It was assumed in *F. & M. Bank vs. Kercheval*, 2 Mich. 506-519, that the law was well settled that no such implied authority existed, and we are not aware that this has before been questioned in this state. See *Pennoyer vs. David*, 8 Mich. 407 *ante*. We think it much safer to require express authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by the arrangement, had agreed to pay this debt, and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so and made collections from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the

creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors having the right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakeley vs. Pasheller*, 4 Cl. & Fin. 207; *Wilson vs. Lloyd*, L. R., 16 Eq. Cas. 60; and *Millerd vs. Thorn*, 56 N. Y., 402.

And it follows as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as was remarked by the vice-chancellor in *Wilson vs. Lloyd*, L. R., 16 Eq. Cas. 60, 71, "the length of time

makes no kind of difference." The time was the same in *Fellows vs. Prentiss*, 3 Denio (N. Y.), 512, 45 Am. Dec. 284, where the surety was also held discharged. And see *Okie vs. Spencer*, 2 Whart. (Pa.) 253, 30 Am. Dec. 251. But that indulgence beyond the time fixed was contemplated when the note was given is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargained for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction, and in most cases it works substantial justice.

The judgment must be reversed, with costs and a new trial ordered.

The other justices concurred.

Judgment reversed.

NOTE: For other cases to the same effect, see Mechem's Elem. of Partn., § 275.

Compare *Barnes vs. Boyers*, following.

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## BARNES vs. BOYERS.

*Supreme Court of West Virginia, 1890.*

34 W. Va. 303, 12 S. E. Rep. 708.

Action of debt by Barnes against Boyers and Harden as partners. Plea of payment, and also a special plea that Boyers & Harden had dissolved partnership; that on such dissolution Harden had assumed and agreed to pay all the debts of the late firm, and, among others, the one sued upon; that after the claim had become due and while Harden was solvent, Boyers in pursuance of the statute had expressly requested the plaintiff to sue Harden for the claim; that plaintiff had neglected to do so; and that Harden had since become insolvent. The statutes of the State provided that a surety might

request the creditor to sue the principal debtor, and that if the creditor failed to do so within a reasonable time he should thereby forfeit his claim against the surety, but against the principal debtor the creditor's rights remained unimpaired. Code of W. Va. Ch. 101, §§ 1, 2.

Judgment for plaintiff and Boyers appealed.

*J. A. Haggerty*, for Boyers.

*U. N. Arnett, Jr.*, and *W. S. Haymond*, for plaintiff.

LUCAS, J. (After referring to a defect in the notice and request served by Boyers, under the statute, upon the plaintiff.) But, independently of this defect, it will be observed that all the rights and remedies against the principal debtor are carefully guarded in these sections, and are to remain unimpaired. And the question is whether both partners did not remain bound to the creditors of the firm as principals notwithstanding the dissolution and agreement whereby, as between themselves, one of them became primarily liable, and the other took the position of his security. It is not in the power of joint debtors to change their relations to a common creditor, without his consent, and the plea does not allege that the plaintiff was ever consulted or ever consented to any such arrangement. In fact, he ignored the notices which were served upon him, as I think he had a right to do.

The case of *Johnson vs. Young*, 20 W. Va., 614, which has been cited in support of a contrary doctrine, goes no further in the syllabus than to decide that where one of two partners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor, and the latter a surety. This annunciation must be taken in connection with the application to the actual facts of that case, which did not, in any manner, involve the question we are now discussing, as to whether the copartners can, by any private arrangement between themselves, change their relations, as principals, to the common creditor. It is true there are some expressions in the opinion (see Id. 657), which intimate such seeming concurrence in the doctrine contended for by the plaintiff in error; but, on the other hand, there is quoted, with approval, an extract from *Buchanan vs. Clark*, 10 Gratt. (Va.) 164, which states the correct doctrine in terse and

unambiguous language, as follows: "As between the partners and the creditor, they were all equally bound; and no understanding and agreement between themselves could change that relation so as to impair his rights."

This is the doctrine of the early text-books, and it is the later English doctrine. Story lays it down thus: "In the first place, the dissolution of a partnership, whether it be by the voluntary act or will of the parties, or by the retirement of a partner, or by mere affiux of time, will not in any manner change the rights of third persons as to any past contracts and transactions with or on account of the firm; but their obligation and efficacy and validity will remain the same, and be binding upon the partnership in the same manner as if no dissolution had taken place." See Story, Partn., sec. 334.

Thus he states the general rule; and upon this particular illustration which we are now considering he is no less emphatic. "It frequently happens that, upon the retirement of one partner, the remaining partners undertake to pay the debt, and to secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners, and can in no respect be admitted to vary the rights of the existing creditors of the firm. But in all cases of this sort it may be stated as a general doctrine that, if the arrangement is made known to a creditor, and he assents to it, and by his subsequent acts or conduct or binding contract he agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claims against the retiring partner, especially if the retiring partner will sustain a prejudice, and the creditor will receive a benefit, from such acts, conduct, or contract." Id. sec. 158.

So, also, Collyer says: "Of course, any arrangement between the partners themselves can not limit or prevent their ordinary responsibilities to third persons, unless the latter assent to such arangement." 1 Colly. Partn. c. 17, sec. 407.

Again he says: "In order that one liability may be replaced by another, by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should at all events show by some act of his own that he accedes to the substitution. If A, being indebted to B, transfers his liability to C, and B does not assent to the transfer, his rights are wholly unaffected; he will neither

acquire any right against C, nor lose his former right against A. As regards B, the agreement between A and C is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B assents to the arrangement come to between A and C, and adopts C as his debtor instead of A, then A's liability to B is at an end, and B must look for payment to C, and to him alone. To apply this to cases of partnership, let it be supposed that a firm of three members, A, B, and C, is indebted to D; that A retires, and B and C, either alone or together with a new partner, E, take upon themselves the liabilities of the old firm. D's right to obtain payment from A, and B, and C is not affected by the above arrangement, and A does not cease to be liable to him for the debt in question." 2 Colly. Partn. c. 24, sec. 596.

Mr. Parsons is, if possible, still more emphatic. He says: "No dissolution of any kind affects the rights of third parties who have had dealings with the partnership without their consent. This is a universal rule, without any exception whatever. Undoubtedly the partners may agree as they please about their joint property, and all the parts of it, and so they may about their joint obligations; and all such agreements are valid, so far as they do not affect the rights of strangers, but where they do, they are wholly void. Thus three partners may agree today to dissolve and to divide all the property in a certain way, specifying that one shall have this, another that, and the third that thing. Or they make such an agreement about some one or more things, and not about all. And these agreements determine the property in these things effectually as to the partners themselves. But they are all responsible *in solido* for the debts due by the firm, and all the joint property of the firm is just as liable for the joint debts after such division or settlements among themselves as it was before. So, too, it is very common for the partners to agree, not only that one of them may settle and wind up the partnership concern, but that one or more shall wind it up, and for that purpose shall have in full property all the goods or funds and business, or a certain part of them, and shall pay all the debts, and this he undertakes to do. Such an agreement is so far binding on the partners that, if either of the others is obliged to pay a debt thus assumed by a partner, the partner paying may have his action for the money against the partner who undertook to pay; but, so far as the creditors are con-

cerned, all the partners remain just as responsible to all the creditors after such an agreement as they were before." Pars. Partn. (3d Ed.) 428.

It is very true that, notwithstanding the unanimity of the text-books upon this subject, some very respectable decisions are to be found, both in England and in the United States, which hold otherwise, and decide that, when once the retiring partner has brought to the notice of a creditor the fact that the remaining member has received all the assets and undertaken to pay the debts, such creditor is bound to recognize the new relation of principal and surety existing by operation of law; and if requested by the retiring partner to collect his claims, and he refuses or neglects so to do, if at the time of the request the principal was solvent and able to pay, but thereafter becomes insolvent, the retiring partner is discharged. Perhaps the leading American case which thus holds is *Colgrove vs. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90. That case is fortified by, if not founded directly upon, the English case of *Oakeley vs. Pasheller*, 10 Bligh, (N. S.) 548, in which the opinion was delivered by Lord Lyndhurst. But this case (*Oakeley vs. Pasheller*), has been much shaken, if not entirely overruled, by the more recent English decisions. According to the statement of the case in the recent and able work on Partnership by Mr. Bates, that case (*Oakeley vs. Pasheller*), is the very reverse of *Miller vs. Miller*, decided by this court in 1875, and reported in 8 W. Va. 542, and the latter case is binding upon us, while the old English case (1836), would only be persuasive. The whole array of authorities, both English and American, upon both sides of the question, are collated by Mr. Bates, who himself evidently inclines to the sounder opinion, supported, as it is, as I have shown, by all of the older text writers. 1 Bates, Partn. secs. 533, 534.

Having concluded, for the reasons stated, that the special plea was bad, the circuit court erred in not sustaining the demurrer to it, but did not err in rejecting all the evidence tending to support it, and the judgment must therefore be affirmed.

Affirmed.

NOTE: Compare with the preceding case—*Smith vs. Sheldon*. See also the note to that case. To the same effect as *Barnes vs. Boyers*, is *Shapleigh Hardware Co. vs. Wells*, 90 Tex. 110, 37 S. W. Rep. 411 (denying *Smith vs. Sheldon*).

Compare with *Colgrove vs. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90.

## GROTTE vs. WEIL, *et al.*

*Supreme Court of Nebraska, 1901.*

62 Neb. 478, 87 N. W. 173.

Error to district court, Douglas county; Dickinson, Judge.

Action by Samuel N. Weil & Co. against Charles Grotte. Judgment for plaintiffs. Defendant brings error. Affirmed.

*O'Neill & Gilbert*, for plaintiff in error.

*C. A. Goss*, for defendants in error.

DUFFIE, C. Charles Grotte, the plaintiff in error, and Katy Grotte, were partners engaged in the wholesale liquor business in the city of Omaha, and in July, 1895, the partnership became indebted to Weil & Co., of Cincinnati. On October 2, 1895, Charles Grotte sold his interest in the business to his copartner, Katy Grotte, she on her part agreeing to pay all outstanding liabilities of the firm, and to hold him harmless from the same.

October 3, 1895, what appears to be a circular letter was sent to Weil & Co., in which it was stated that Charles Grotte had retired from the firm, and had no further interests therein, and that the new management had assumed and would pay all indebtedness. This letter was received by Weil & Co., in due course of mail. On October 4th, Charles Grotte wrote a personal letter to Weil & Co., in which he stated that he had retired from the firm of Grotte & Co., and soliciting employment as traveling salesman for them. To this letter Weil & Co., replied on October 6th, in which letter they called attention to the indebtedness of Grotte & Co., and said, "You are aware you are responsible to us for this debt." March 9, 1896, the indebtedness due Weil & Co. had been reduced to $296.80, and on that date Katy Grotte executed her note to Weil & Co. for the amount, Matthew A. Hall becoming surety thereon. This note was taken by the law firm of McCabe, Wood, Elmer & McGilton, to whom Weil & Co. had sent the account for collection. We wish to remark here that the plaintiff in error insists that Weil & Co. took this note in payment of the account, while defendants in error claim that the note was taken as collateral security, and without prejudice to the right of Weil & Co. to sue the account any time. The note when received by

Weil & Co., was discounted at a bank in Cincinnati, and at its maturity the Cincinnati bank sent it to Omaha for collection, where it was protested for nonpayment, returned to the Cincinnati bank, and taken up by Weil & Co.

The account of Grotte & Co., was credited with the amount of the note when received, and the account closed, but, upon the note being protested and returned to Weil & Co., the account was charged with the amount of the note. On again coming into possession of the note, Weil & Co., sent it to their attorneys in Omaha for collection, and, when payment was demanded of Hall, the surety, he requested the attorneys to commence suit on the account, promising, when judgment was obtained, to purchase the judgment. At a later date, and as testified to by Hall and McGilton, who had the note in charge, Hall gave his personal check for the amount of the note, not as payment, nor to be sent to Weil & Co., but as an evidence of his good faith in agreeing to purchase any judgment that might be obtained against the members of the firm of Grotte & Co., on the account, it being understood that McGilton was to hold the check in his own possession until after the trial of the cause. Suit was brought on the account in the county court against the firm of Grotte & Co., and the individual members thereof, and judgment entered for the plaintiff in said action.

Charles Grotte appealed to the district court, and the court, after the evidence was closed, directed the jury to return a verdict for the plaintiff, and from a judgment entered on this verdict the plaintiff in error has brought the case to this court. After the entry of judgment in the county court, Hall borrowed money from one Montgomery, with which he purchased the judgment from Weil & Co., and took an assignment thereof to Montgomery.

Several errors are assigned, but the material question for our consideration is whether the court erred in directing a verdict for the plaintiffs. If the court was right in directing a verdict, the other errors assigned and argued are immaterial. The plaintiff in error is undoubtedly right in his contention that after a sale of his partnership interest to Katy Grotte, one of the considerations of which was that she should assume and pay the firm indebtedness, she, as between themselves, became the principal debtor, and he a surety. Did Charles Grotte occupy the relation of a surety to Weil & Co.?

At the time Grotte & Co. purchased from Weil & Co. the

goods on account of which this indebtedness was contracted, the firm of Grotte & Co., Charles Grotte and Katy Grotte, the individual members of the firm, were each and all primarily liable for the debt, and the question is, can two parties, each being primarily responsible to a creditor for the payment of a debt, change the relation of one of them by some agreement among themselves, and to which the creditor is not a party, in such a way that one of those shall become a surety only for the payment of the debt, and change the relation existing between them and the creditors so as to require the creditor to deal with the party as though he had been a surety only at the inception of the account? This is still an open question in this state, and, as the courts of the country are divided, we are at liberty to adopt the rule that we see fit, and one which we think is the better rule. The following cases hold that partners, by an agreement among themselves, may make one partner a surety for the payment of the firm creditors, and compel the creditors, in the collection of their claim, to deal with him upon the strict rules applicable to the rights of a surety: *Stone vs. Chamberlin*, 20 Ga. 259; *Hoopes vs. McCan*, 19 La. Ann. 201; *Barber vs. Gillson*, 18 Nev. 89, 1 Pac. 452; *Bell vs. Hall*, 5 N. J. Eq. 477; *Millerd vs. Thorn*, 56 N. Y., 402; *Colegrove vs. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Gates vs. Hughes*, 44 Wis. 332.

The cases holding a contrary doctrine are: *Mason vs. Tiffany*, 45 Ill. 392; *Williams vs. Boyd*, 75 Ind. 286; *Aiken vs. Thompson*, 43 Iowa, 506; *Rawson vs. Taylor*, 30 Ohio St. 389, 27 Am. Rep. 464; *Whittier vs. Gould*, 8 Watts, 485; *Norton vs. Richards*, 13 Gray, 15: *McCoy vs. Jack* (W. Va.) 34 S. E. 991. The general rule relating to all contracts is that the parties thereto cannot change their relation to each other except by a new contract to that effect, based upon some new consideration. This rule, in its application to cases like the one under consideration, is spoken of by Judge Story in the following language: "It frequently happens that upon the retirement of one partner, the remaining partner undertakes to pay the debts and secure the creditors of the firm. This is a mere matter of private arrangement and agreement between the partners, and can in no respect be admitted to vary the rights of existing creditors of the firm." Story, Partn. § 158.

We do not wish to be understood as holding that the creditors of a firm, upon learning that one partner had retired, will

not be held to the duty of acting in good faith in the management of security placed in his hands for the payment of his claim, or in the preservation of liens and in the application of payments made. Should the creditors fail, after notice, to perform these duties, and such failure result in damage to the retired partner, it might well be regarded in a court of equity as cause to release him, at least to the extent of his damage. In such case the terms of the contract have not been changed, but the fact that new relations had arisen between the partners, by which one assumes, as between them, the burdens of all, might well call upon the creditors to act in such a way as not to injure the retiring partner. We cannot, however, go to the extent of holding that a contract upon which two persons agree with a third to be jointly and primarily liable for a debt can be changed by the agreement of the debtors themselves so as to require the creditor to accept one as a principal debtor and the other as surety for its payment. With this as our view of the law, and with the remark that we cannot discover in the record any bad faith on the part of Weil & Co. in the steps taken for the collection of their claims, it becomes unnecessary to examine other matters discussed in the brief of counsel for the plaintiff in error.

We might say, however, that it appears to us that there was no consideration whatever existing for the note given by Mr. Hall. The evidence is undisputed that, when the note was taken, McGilton, who held the note for collection, refused to make any agreement for the extension of time, and expressly reserved the right to sue the account whenever he saw fit. It was expressly agreed that this note should be held as collateral security, and a sale of the note by Weil & Co., if to discount it means that a sale was made, would simply be a conversion of the note upon the part of Weil & Co. The evidence is also undisputed that the check given by Hall was not to be used in the payment of this claim, but was to be held by McGilton in the nature of a security that Hall would perform his agreement, and buy whatever judgment Weil & Co. might recover upon their account against Grotte & Co. and the partners of that firm. We discover no error in the record, and recommend that the judgment of the district court be affirmed.

ALBERT and AMES, CC., concur.

PER CURIAM. For the reason stated in the foregoing opinion, the judgment of the district court is affirmed.

NOTE.—See Mechem's Elem. of Partn. §§ 274-276.

# XV.

# APPLICATION OF ASSETS TO CLAIMS OF CREDITORS.

## CASE vs. BEAUREGARD.

*Supreme Court of the United States, 1873.*

99 U. S. 119, 25 L. Ed. 370.

Action in equity brought July 10, 1869, by Case, as receiver of the First National Bank of New Orleans, against Beauregard, May, Graham, Binder, Bonneval, Hernandez, the New Orleans & Carrollton R. R. Co., and the Fourth National Bank of New York, to recover a debt of $237,000, which he claimed was due from, and had been contracted by, Beauregard, May and Graham as copartners; and to have certain transfers of partnership property set aside and the property subjected to the payment of the debt.[1] He claimed that the First National Bank, being creditor of the firm, had a lien upon the partnership property and priority in payment out of the firm assets; that the firm and the individual partners were insolvent; and that the deeds referred to in the opinion were in fraud of the rights of the Bank and should be set aside.

Complainant's bill was dismissed below and he appeals.

*J. D. Rouse* and *Chas. Case*, for appellant.

*John A. Campbell* and *H. C. Miller*, for appellee.

*Asst. Atty. Gen'l. Smith*, for the United States.

Mr. Justice STRONG delivered the opinion of the court. The object of this bill is to follow and subject to the payment

[1] For other aspects of the same controversy, see *Bank vs. Carrollton Railroad, ante*.

of a partnership debt property which formerly belonged to the partnership, but which, before the bill was filed, had been transferred to the defendants. There is little if any controversy respecting the facts, and little in regard to the principles of equity invoked by the complainant. The important question is whether those principles are applicable to the facts of the case.

No doubt the effects of a partnership belong to it as long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after the payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice vs. Barnard*, 20 Vt. 479, 50 Am. Dec. 54. Appeal of the York County Bank, 32 Pa. St. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there

any trust that can be enforced until the property has passed in *custodiam legis*. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.

So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin* (6 Ves. 119), where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord ELDON that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not *mala fide*. *Kimball vs. Thompson*, 13 Metc. (Mass.) 283; *Allen vs. The Centre Valley Company*, 21 Conn. 130, 54 Am. Dec. 333; *Ladd vs. Griswold*, 9 Ill. 25, 46 Am. Dec. 443; *Smith vs. Edwards*, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; *Robb vs. Mudge*, 14 Gray (Mass.) 534; *Baker's Appeal*, 21 Pa. St. 76; *Sigler vs. Knox County Bank*, 8 Ohio St. 511; *Wilcox vs. Kellogg*, 11 Ohio 394.

The joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone. These principles are settled by very abundant authorities. It remains, therefore, only to consider whether, in view of the rules thus settled and of the facts of this case, the complainant, through any one of the partners, has a right to follow the specific property which formerly belonged to the partnership, and compel its application to the payment of the debt due from the firm to the bank of which he is the receiver.

The partnership, while it was in existence, was composed of three persons, May, Graham, and Beauregard, but it had

ceased to exist before this suit was commenced. It was entirely insolvent, and all the partnership effects had been transferred to others for valuable considerations. None of the property was ever within the jurisdiction of the court for administration.

On the 8th of May, 1867, Graham, one of the partners, assigned all his right and interest in any property and effects of the partnership, and whatever he might be entitled to under the articles thereof, together with all debts due to him from the partnership or any member thereof, to the Fourth National Bank of the city of New York. By subsequent assignments made on the 14th and 16th of May, 1867, May, the second partner, transferred all his interest in the partnership property to the United States, and by the same instrument transferred to the United States, by virtue of a power of attorney which he held, the interest of Graham. On the 21st of August, 1867, the United States sold and transferred their interest obtained from May and Graham in all the partnership property, including real estate, to Alexander Bonneval, Joseph Hernandez, and George Binder. On the 15th of October next following, an act of fusion was executed between the New Orleans and Carrollton Railroad Company, Beauregard, Bonneval, Hernandez, and Binder, by which the rights of all the parties became vested in the railroad company, subject to the debts and liabilities of the company, whether due or claimed from the lessee or the stockholders.

The effect of these transfers and act of fusion was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. *Baker's Appeal*, 21 Pa. St. 823. That was a case where a firm had consisted of five brothers. Two of them withdrew, disposing of their interest in the partnership estate and effects to the other three, the latter agreeing to pay the debts of the firm.

Some time after, one of the remaining three sold his interest in the partnership property to one of the remaining two partners. The two remaining, after contracting debts, made an assignment of their partnership property to pay the debts of the last firm composed of the two; and it was held that the creditors of the first two firms had no right to claim any portion of the fund last assigned, and that it was distributable exclusively among the creditors of the last firm. So in *McNutt vs. Strayhorn* (39 Id. 269), it was ruled that though the general rule is that the equities of the creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and, therefore, there is no case for the application of the rule. See, also, *Coover's Appeal*, 29 Pa. St. 9, 70 Am. Dec. 149. Unless therefore, the conveyances of the partners in this case and the act of fusion were fraudulent, the bank of which the complainant is receiver has no claims upon the property now held by the New Orleans and Carrollton Railroad Company, arising out of the facts that it is a creditor of the partnership, and was such a creditor when the property belonged to the firm.

The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors,—a fraud which those partners could waive, and which was subsequently waived by the act of fusion. Besides, that act made provision for some of the debts of the partnership. And it has been ruled that where one of two partners, with the consent of the other, sells and conveys one-half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sale and conveyances are not *prima facie* void, as against creditors of the firm, but are *prima facie* valid against all the world, and can be set aside by the creditors of the firm only by proof that the transactions were fraudulent as against them. *Kimball vs. Thompson*, 13 Metc. (Mass.) 283; *Flack vs.*

*Charron*, 29 Md. 311. A similar doctrine is asserted in some of the other cases we have cited; and see 21 Conn. 130. In the present case we find no such proof. We discover nothing to impeach the *bona fides* of the transaction, by which the property became vested in the railroad company.

Thus far we have considered the case without reference to the provisions of the Louisiana Code, upon which the appellant relies. Art. 2823 of the Code is as follows: "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner." We do not perceive that this provision differs materially from the general rule of equity we have stated. It creates no specific lien upon partnership property, which continues after the property has ceased to belong to the partnership. It does not forbid *bona fide* conversion by the partners of the joint property into rights in severalty, held by third persons. It relates to partnership property alone, and gives a rule for marshalling such property between creditors. Concede that it gives to joint creditors a privilege while the property belongs to the partnership, there is no subject upon which it can act when the joint ownership of the partners has ceased. Art. 3244 of the Code declares that privileges become extinct "by the extinction of the thing subject to the privilege."

What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

The bank has, therefore, no specific claim upon the property, nor is there any trust which a court of equity can enforce; and it was well said by the circuit justice, that, without some constituted trust or lien, "a creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding" in equity.

Decree affirmed.

NOTE: See Mechem's Elem. of Partn., § 280.

## ARNOLD vs. HAGERMAN.

*Court of Errors and Appeals of New Jersey, 1889.*

45 N. J. Eq. 186, 17 Atl. Rep. 96, 14 Am. St. Rep. 712.

On July 17, 1883, John C. Farr, having a lumber business at Hoboken and a manufacturing business at Asbury Park, formed a partnership as to the latter business with J. H. Hagerman and J. S. Fielder, under the firm name of J. C. Farr & Co. Hagerman and Fielder gave Farr their note for the interests they acquired in the Asbury Park business. On October 29, 1883, the new firm was embarrassed financially and dissolved. Hagerman and Fielder assigned to Farr all their interests in the business, and Farr returned their notes and agreed to pay the debts. On November 30, 1883, Farr assigned all his property, under the statute, to Arnold, for the benefit of creditors. In the early part of 1884, the Second National Bank of Red Bank obtained judgments against the members of the firm of J. C. Farr & Co., for debts due from that firm, and caused executions to be levied on what had been the property of that firm. The bank afterwards filed a bill to set aside the transfers from Hagerman and Fielder to Farr, and the assignment of Farr to Arnold on the ground that they were fraudulent as against the creditors of J. C. Farr & Co.

The court below held the transfers by Hagerman and Fielder to Farr to be void.

Appeal.

*Gilbert Collins*, for appellant.

*A. C. Hartshorne*, for Hagerman and Fielder.

*J. C. Applegate* and *F. W. Hope*, for the Bank.

DIXON, J. (After disposing of other matters.) In equity a partnership is for some purposes deemed a single entity. Thus, when the property involved in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and is used first to liquidate the debts contracted in the business

of that debtor, and only the surplus, if any, is surrendered to the individual partners. This equitable practice rests upon the presumed intention of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord ELDON in *Ex parte Ruffin*, 6 Ves. 119, it has been generally held that the partners could put an end to this right, and that if, by their agreement, the partnership is dissolved, and its property is assigned to one of their number, or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct. Growing out of this right of partners has arisen a corresponding equity in partnership creditors to have their debts first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally it may be said that this equity of creditors continues only so long as the right of the partners against each other subsists, and perishes when that terminates; but this is not universally true, for this equity may survive the right to which, ordinarily, it is attached. In this respect it resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is, ordinarily, but a right by lawful procedure to acquire a lien during the ownership of the debtor; yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has alienated his property with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of *bona fide* purchasers, for good consideration, without notice. Equity applies this statute to a partnership, its property and creditors, just as it would in case of an individual, and therefore, while generally it is true that a partnership may defeat the equity of its creditors by the alienation of its property and consequent extinguishment of the right of its partners *inter sese*, yet, if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects. This doctrine has

repeatedly been recognized in the courts of New Jersey. Thus, in *Matlack vs. James*, 13 N. J. Eq. 126, two members of a firm consisting of four persons conveyed their undivided half of land, held for partnership purposes, to an outsider, in payment of their individual debt to him. Chancellor GREEN, finding that the conveyance was designed to defeat the equitable claim of partnership creditors, adjudged it void, and applied the whole proceeds of the land to paying those creditors. In *Bank vs. Sprague*, 21 N. J. Eq. 530, 544, Mr. Justice VAN SYCKLE, speaking for this court, plainly intimated an opinion (the case not calling for a decision on the point) that an insolvent firm could not defeat this equity of partnership creditors by giving to creditors of the individual members a prior lien on partnership property, and referred to Chancellor WALWORTH'S opinion in *Kirby vs. Schoonmaker*, 3 Barb. Ch. 47, 49 Am. Dec. 160, as supporting that doctrine by sound reasoning. The language of the chancellor thus approved was: "The copartners certainly have the right to dissolve the partnership, and divide the property of the firm between them, provided there is no intention of delaying or hindering their creditors in the collection of debts. * * * The case would have been entirely different if copartners, who were insolvent, and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, had made an assignment of the property of both to pay the individual debt of one of the copartners only; for an insolvent copartner, who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity." So, in *Van Doren vs. Stickle*, 24 N. J. Eq. 331, affirmed by this court, 27 N. J. Eq. 498, it was declared that a voluntary transfer by a firm of notes owned by the partnership to the wife of one of the partners was fraudulent as to partnership creditors, and the notes in the hands of the wife were decreed to be partnership assets. To the like effect is the language of Mr. Justice DEPUE, delivering the opinion of this court in *Clements vs. Jessup*, 36 N. J. Eq. 569: "Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the

consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts."

The case before us comes clearly within the reach of this principle. At the time of the transfer by Hagerman and Fielder to Farr the insolvency of each of these persons, and of the firm of J. C. Farr & Co., was patent to them all, and, indeed, was the moving cause of the transfer. They all knew that, in the condition of affairs then existing, none of them could meet maturing obligations, and it was in the hope of facilitating an extension or compromise with creditors that the transfer was made. The transfer embraced all the partnership property. If valid in all respects, it appropriated the shares of Hagerman and Fielder to the payment of the debts of Farr, for which those shares were previously not liable, and left Hagerman and Fielder without any property whatever, as we gather from the testimony, to pay their debts. Inevitably, therefore, by defeating the equity of the partnership creditors, it would hinder them in the collection of their just claims. It is a reasonable inference that these partners intended this manifest effect of their act, and consequently the assignment by Hagerman and Fielder to Farr must, according to the terms of the statute, be deemed void as against the partnership creditors. Not only upon the ground of a common intent to hinder partnership creditors, thus inferred from the knowledge which all parties must have had of the necessary consequences of the transfer itself, but also upon the ground that the transfer was made without valuable consideration,—was voluntary in the legal sense,—it should be decreed invalid against the partnership creditors, all of whose debts were then in existence. *Haston vs. Castner*, 31 N. J. Eq. 697. The consideration nominally given by Farr to Hagerman and Fielder was the surrender of their notes and his covenant to indemnify them against firm creditors. But according to the testimony those notes were payable only out of the profits accruing to Hagerman and Fielder from the firm of J. C. Farr & Co., and as that firm had failed, and was dissolved without realizing any profits, the notes had become absolutely valueless. Farr's covenant to indemnify does not constitute a valuable consideration, since he may be relieved

therefrom on the total failure of the transfer for which it was made. 2 Pom. Eq. Jur. §§ 751, 969; notes to *Basset vs. Nosworthy*, 2 Lead. Cas. Eq. 82; *Haughwout vs. Murphy*, 22 N. J. Eq. 531. It thus appearing that, notwithstanding this transfer, all the rights and remedies of the creditors of J. C. Farr & Co. remained against the firm property in in the hands of Farr, we are brought to consider the assignment to Arnold for the benefit of Farr's creditors. With respect to this assignment, the following propositions may, I think, be maintained: *First*, that the creditors of J. C. Farr & Co. are included among its beneficiaries; *second*, that it conveyed, not only the property of Farr as an individual, but also that which had been the property of J. C. Farr & Co.; *third*, that it conveyed this latter property subject to the equity of the creditors of that firm; and, *fourth*, that, so construed, the assignment cannot be successfully impeached by the complainant.

The first proposition is unquestionable. The creditors of J. C. Farr & Co. were all creditors of Farr, for whose benefit the assignment was expressly made.

In considering the second proposition, it must be remembered that at the time of this transfer Farr was in reality the owner of the property previously belonging to J. C. Farr & Co. He had become so by the conveyance from his partners, which then nobody had disputed, so that the assignment to Arnold of all the property owned by Farr included in its terms the firm property. This was made still clearer by the inventory annexed, which specified in detail the property at Asbury Park. Even if the transfer from Hagerman and Fielder to Farr be disregarded, still it will appear that the assignment to Arnold included the property of J. C. Farr & Co.; for, in view of the fact that it purported to convey such property, the conduct of Hagerman and Fielder precludes their denial of its efficiency. They both knew that Farr was about to assign the firm property to Arnold; they both, without objection, delivered over that property to Arnold in pursuance of Farr's assignment; they both took part in the management of that property under Arnold as assignee; and neither of them raised any question as to Arnold's title until after creditors of J. C. Farr & Co. had proved their debts under the assignment. Whether, in these circumstances, we look for a

ratification by Hagerman and Fielder of the transfer of firm property by Farr as their partner and agent, or for a transfer directly by the joint act of all the partners, or for an estoppel preventing Hagerman and Fielder from denying that the assignment conveyed the effects inventoried and delivered,—in any view the property of J. C. Farr & Co. passed to the assignee.

Touching the third proposition, that this property was conveyed subject to the equity of the firm creditors, it would be beyond cavil, had the assignment shown upon its face a conveyance of the property of Farr, and also of J. C. Farr & Co., for the benefit of creditors. As was said by Chief Justice HORNBLOWER, in *Scull vs. Alter*, 16 N. J. Law, 147: "If it is an assignment, not only of the partnership effects and property of the firm, but also an individual and several assignment by the members of their respective and separate estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of each member applied in the first instance to the payment of his separate debts." See, also, *Garretson vs. Brown*, 26 N. J. Law, 425, 435. But as this assignment speaks of all the property embraced in it as belonging to Farr alone, a different view might be taken of it. Usually, indeed, courts have held that an assignee for the benefit of creditors is not a purchaser for value, but takes the property subject to all equities that would have been valid against the assignor. Notes to *Basset vs. Nosworthy*, 2 Lead. Cas. Eq. 87. Many of the decisions to this effect, however, have gone upon a theory that debts proved under the assignment are not extinguished except so far as they are paid by dividends, or that a pre-existing debt is not a valuable consideration for a conveyance; and as neither of these theories is tenable in New Jersey, there may be found sufficient reasons for holding, in this state, that a creditor proving under an assignment should be regarded in equity as favorably as a purchaser for value, although, in *Vandoren vs. Todd*, 3 N. J. Eq. 397, the opposite doctrine prevailed.

But conceding to the assignee and to the individual creditors of Farr, who have proved their debts, the rights of purchasers for value, they still are bound by the equity of the firm creditors, for they had notice of that equity. "The rule,"

says Prof. Pomeroy (2 Pom. Eq. Jur. § 753), "is universal and elementary that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interests under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration." That Arnold, before the assignment, and all the personal creditors of Farr before they proved their claims, were notified that the Asbury Park property had belonged to J. C. Farr & Co., and had been transferred to Farr when that firm and all its members were insolvent, is fully established by the evidence in the cause. This notice before the assignment was acquired by Arnold from conversations with Farr, and by Arnold and many, if not all, of Farr's individual creditors, through inquiries made by Eaton and Lawson, a committee appointed by the creditors to investigate the affairs of Farr and J. C. Farr & Co. After the assignment, but before any debts were proved, such notice was still more definitely communicated to all of Farr's creditors, through the report of their committee, in which the assets and liabilities of Farr and of J. C. Farr & Co., respectively, are distinctly stated. This report also plainly indicates an understanding or expectation that the property assigned would be marshalled between the creditors of Farr and the creditors of the firm. It was made January 19, 1884, while the first claim proved was presented to the assignee January 28, 1884. Fuller notice than this report contained of the equity of the firm creditors could not well be given. Hence those creditors are still entitled to have the partnership property applied to the payment of their debts, in preference to the debts of Farr's individual creditors.

The fourth proposition denies the right of the complainant to impeach this assignment. The assignment was in the form sanctioned by our statute. It was for the benefit of all creditors who were entitled to any share in the property assigned: it created no preferences; and it provided for no delay beyond what was necessary for the execution of the trust which it properly declared. Although such assignments do hinder creditors from obtaining that priority of lien which otherwise their vigilance might secure, yet they are not on that account within the meaning and scope of the statute which avoids transfers to defraud creditors. 2 Pom. Eq. Jur. § 994, note.

The assignment was perfected before the entry of complainant's judgments, and, as it operated to divest the legal title of the debtors, the complainant's executions did not become a lien. The assignment, as we construe it, placed all the creditors of the same class upon an equal footing, and in such cases equality is equity. Consequently both in law and in equity, the complainant is bound.

The conclusion of the matter is that the property of Farr and the property of J. C. Farr & Co. should be marshalled between the creditors of those two debtors, respectively. * * *

Let the decree appealed from be reversed, and a decree be entered in accordance with these views.

Unanimously reversed.

NOTE: See Mechem's Elem. of Partn., § 288.

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## HAGE vs. CAMPBELL.

*Supreme Court of Wisconsin, 1891.*

78 Wis. 573, 47 N. W. Rep. 179, 23 Am. St. Rep. 422.

Action for conversion of goods. Plaintiff claimed the goods under a chattel mortgage given by the firm of Hage Bros. Defendant, as sheriff, had levied upon the goods at the suit of unsecured creditors of the firm. Other facts are stated in the opinion. Plaintiff had judgment below and defendant appeals.

*R. S. Reid*, for appellant.

*W. Goss*, for respondent.

COLE, C. J. The plaintiff's right to recover the value of the goods in controversy depends entirely upon the validity of a chattel mortgage given to him by the Hage Bros., dated May 3, 1886. If that mortgage is valid, as against the creditors of the firm, the judgment is correct. The objection taken to this mortgage is that it was not given to secure the payment of a partnership debt, and is therefore void as to the firm creditors. We think the jury must have found, under the charge of the court, that the mortgage was given to secure the *bona fide*

indebtedness of the firm, and that there was no fraudulent intent in giving it. That there was evidence tending to establish these facts cannot be successfully denied if the plaintiff's testimony is to be believed; for he testified, in substance, that he loaned Iver Hage $600 in June, 1884, and that before Christmas, 1885, he loaned both Iver and Torger $200 more. In June, 1884, Iver and one Canudson were in partnership, and the plaintiff said the $600, which he loaned Iver Hage, was used by them to purchase goods for the firm. It does not clearly appear that Iver made the loan of $600 for the firm of Hage & Canudson, though probably the loan inured to the benefit of the firm. The plaintiff does say that Canudson had nothing to do in borrowing the $600 from him, by which he means, as we understand his testimony, that Canudson did not act in the matter. This, of course, might be true, and still it might be the fact that Iver acted for the firm in making the loan. It satisfactorily appears that the firm had the benefit of the loan, and that the money was applied to purchase goods for the firm. But, it is said, *non constat*, but this $600 was Iver's contribution to the capital stock of the partnership. But the matter, as to whether this debt was one that the firm was liable to pay, does not rest upon the facts above stated. It appears that, in the spring or summer of 1885, Torger Hage purchased the interest of Canudson in the firm, and that then he and Iver both promised to pay the plaintiff the $600 loan. Now, if it be assumed that the $600 was originally loaned to Iver, and that it was his individual debt, yet as the money had been used to purchase goods for the firm, could not the partners, when the new firm was organized, assume this debt and bind the firm to pay it? There is nothing to show that the firm was insolvent at this time, and we suppose it might bind the firm to pay the individual debt of one of the partners. We do not understand that such an application of the assets, or such a liability assumed, would be a fraud upon partnership creditors, if the firm was solvent and able to pay its other debts at the time. The learned circuit court distinctly charged that, if the debt was the individual debt of Iver Hage, it must have been assumed by the partnership so as to become a firm liability, in order to sustain the mortgage which was subsequently given. But, that a solvent firm might assume the individual

debt of one of the partners, and agree to pay it out of the partnership property, and give a valid mortgage on its stock for that purpose, providing the transaction was free from fraud, is clear. So that, if, at the time the new firm was organized, the debt became the partnership liability by the firm's assuming it and agreeing to pay it, then the claim stood upon the same footing as any other firm debt. This is not the language of the charge but is its meaning, and the sense in which the jury must naturally have understood it. It seems to us the court was right in this view of the law. There can be no doubt that the jury were satisfied, from the evidence, that, when the new firm was organized, this $600 loan was assumed by the firm and became the partnership debt of Hage Bros.; and it is not claimed that the firm was insolvent at that time. If the firm was insolvent, it could not assume the individual debt of a partner, and secure its payment by a mortgage upon the partnership property, as such an act would be in fraud of the partnership creditors, who had the right to be first paid, and so the jury were instructed.

As to the $200 which the plaintiff loaned Hage Bros. about a month before Christmas, in 1885, there can be no question but that it was a partnership debt. It is argued that, if the $600 loan had in fact become a partnership debt, the books of Hage Bros. should have shown a credit for that amount in favor of the plaintiff, or that a note or some security should have been given to the plaintiff as evidence of the firm liability. Correct business methods would doubtless have required some entry of the transaction upon the books of the firm, but the business seems to have been done very loosely, the parties having confidence in each other, and trusting to the oral agreement. It does not appear that there was an entry made of the $200 on the firm books, or any note given for it, though, unquestionably, it was a loan to the firm of Hage Bros. The court instructed the jury that the facts that the books of Hage Bros. did not show a credit in favor of the plaintiff for his money loaned, and that no note was given nor security taken, nor agreement made as to when the money was to be repaid, were circumstances to be weighed when considering the credibility of the plaintiff's testimony. These were proper matters to be considered in determining the question as to whether the debt was a valid partnership liability, or whether the chattel

mortgage was given for any fraudulent purpose. The mortgage was given, as we have said, on the 3d of May, 1886. At that time the firm of Hage Bros. was embarrassed and in failing circumstances. But the mortgage was given by one partner, in the absence of the other partner, to secure an existing firm liability. Could not such a security be given to secure an honest *bona fide* debt, where there was no intent to cover up property for the benefit of Hage Bros., or to defraud their other creditors? We suppose the plaintiff had the right to take the mortgage and secure himself, even though the other creditors might suffer by his doing so. One creditor has the right to induce a failing debtor to pay or secure his debt, and the fact that this might lessen the ability of the debtor to pay other creditors does not necessarily avoid the payment or invalidate the security. The mortgage was given to secure the payment of $910.61, the amount of the firm debt, and the property mortgaged was not worth much more than that sum.

There is an objection that the property was not sufficiently described in the mortgage, but we think the objection is not well taken. The schedule referred to, and attached to the mortgage, clearly identifies and describes the property embraced in the instrument. It does describe the articles in the "show cases" with sufficient fullness to indicate what property was intended to be covered by the mortgage. The mortgage was given by Torger Hage on behalf of the firm, in the absence and without the knowledge of the other partner, Iver Hage, who was absent in Dakota. We suppose one partner may, without the consent of his copartner, being absent, pay a debt or execute a mortgage in the name of the firm upon partnership property, to secure a firm debt. The power of each partner to bind the firm fairly extends to such a transaction, unless restricted by the articles of copartnership, and it does not appear that there was any such restriction on the power of the partner in this case. It was clearly within the scope of the implied authority of Torger to execute the mortgage, as much as selling the goods or collecting the debts due the firm. This proposition seems too plain to require discussion. The mortgagee, deeming himself insecure, took possession at once of the mortgaged property, as he had the right to do, and employed Torger, as agent or clerk, to sell the goods and pay over the proceeds to him, to be applied upon the mort-

gage debt. There is no legal objection to such an arrangement. It certainly did not create any secret trust, as counsel suggests. The plaintiff might employ the mortgagor to sell the goods for him and pay over the proceeds of all sales made.

The action is for a wrongful conversion of the goods, alleged in the complaint to be of the value of $1,147.41. The defendant, as sheriff, seized the goods under attachments issued in favor of the creditors of the firm of Hage Bros. In the answer the defendant denies that the goods were "of any other or greater value than $917.63." This, fairly construed, must be deemed to refer to the mortgaged property mentioned in the complaint. A point is made that the value of the property was not proven on the trial. It certainly appears that the property did not exceed the amount due upon the note and mortgage, and, in view of the admission in the answer as to the value, we think no further proof as to that fact was necessary. The recovery was less than the value stated in the answer and the interest thereon, to the commencement of the action. This disposes of all the material questions. The case seems to have been fairly submitted, under proper instructions as to the law for the guidance of the jury, and the judgment of the circuit court must be affirmed.

NOTE: See Mechem's Elem. of Partn., § 268.

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## GODDARD-PECK GROCERY CO. vs. McCUNE.

*Supreme Court of Missouri, 1893.*

123 Mo. 426, 25 S. W. Rep. 904, 29 L. R. A. 661.

This case was certified to the supreme court from the St. Louis court of appeals for the reason that one of the judges of that court was of the opinion that the decision filed in that court was in conflict with the decision in the case of *Sexton vs. Anderson*, 95 Mo. 373, 8 S. W. 564. The opinion of the court of appeals is reported in 47 Mo. App. 307. The statement of THOMPSON, J., of said court, is as follows: "John McCune presented for allowance against the assigned estate of the partnership firm of Edwards & Wigginton a promissory note,

made by said firm on the first day of July, 1889, for $2,000, payable one day after date, to his order, and bearing interest from date at the rate of eight per cent per annum. Calvin Wigginton also presented a note of the same date and tenor for the sum of $1,926. The assignee allowed both of these notes, and certain other creditors of the firm appealed to the circuit court. The circuit court disallowed the notes, and from its judgment disallowing the notes in favor of McCune this appeal is prosecuted. The case was, by consent of parties, submitted to the court without a jury, and no declaration of law was asked or given. It appeared in evidence that the partnership firm of Edwards & Wigginton was founded in March, 1889, and made an assignment for the benefit of its creditors in July, 1890. The business was a retail grocery store. The basis of the business was a stock in trade owned by the appellant, McCune, which McCune sold to Edwards in 1887 for $2,600. When Edwards took Wigginton in as a partner, in March, 1889, the stock was invoiced at between $3,300 and $3,400. They were to be equal partners, and the arrangement was such that Wigginton purchased a half interest in the stock in trade and business for $1,626, and then each partner put into the business in cash the sum of $300. The indebtedness of Edwards to McCune was originally evidenced by three unsecured promissory notes, maturing, respectively, in six, twelve, and eighteen months from date. Edwards had borrowed other money of McCune, and had made such payments that on the 1st of July, 1889, the indebtedness of Edwards to McCune stood at $2,000. The $1,926 that Wigginton put into the firm, as above stated, was entirely borrowed from his father, Calvin Wigginton. Of this $900 was a note, due one day after date, and bearing interest at the rate of six per cent per annum; $500 was a like note, and the rest was not evidenced by any note. Thus it was that the interest of each partner consisted entirely of borrowed capital; that Edwards still owed this claimant, McCune, $2,000 for his interest in the partnership capital and business; and that Wigginton, for his interest therein, owed his father $1,926. We proceed on the view that what each partner had thus severally borrowed to purchase his interest in the business was an individual, and not a partnership debt. The firm seems to have lost money almost from the start, and McCune, becoming uneasy,

requested Edwards to take up the individual notes of Edwards, held by McCune, with the note of the firm. At the same time Wigginton, Sr., thought that if McCune was going to have firm paper for the individual note of Edwards, he, Wigginton, ought to have firm paper for what was due him from his son, as already stated. It was accordingly arranged between the partners, and these individual creditors, respectively, that the two creditors should have firm papers; and on the first day of July, 1889, the firm executed its note to McCune in settlement of the individual notes of Edwards, and also its note to Wigginton, Sr., in settlement of the individual debt of Wigginton, Jr., to him. The testimony leaves no room to doubt that this was done in contemplation of a possible suspension, and the avowed purpose of it was to put these individual creditors, in the event of a suspension, on an even footing with firm creditors. Edwards testified: 'It was this way: I had a great deal of sickness, and had lost on grain I had bought, and McCune insisted on some plan of securing him. He was willing to aid us tide over our difficulties, if in any way to make himself safe,—to take joint note for the firm's note. I spoke to Wigginton, my partner, about it. He at the same time owed his father a like amount, or very near it. He insisted that he would want to secure his father as well as John McCune, so we mutually agreed to give them the firm's note for the amount of each claim. Both of these notes were given at the same time.' Further on Edwards testified: 'We gave a firm note, so that, in case of death or failure, they would share and fare like our other creditors.' On the same point the other partner testified: 'We saw the business was losing money; saw no prospect of times getting better, owing to the competition on each side of us; and we did not care to favor one person and not others. We wanted to treat everybody alike.' When the firm failed, some six months later, its liabilities, including these notes, footed up to about $5,600. Its assets were inventoried at $3,149.95, but the assignee realized only the sum of $770 from the sale of the entire stock of goods under order of the court at public auction, and had succeeded in collecting only $70 of the $626 due the firm from its customers. Of these liabilities about $1,500 were due to merchants from whom it had bought goods."

*Fagg & Ball*, for appellant.

*J. D. Hostetter*, *E. W. Major* and *Eben Richards*, for respondent.

BURGESS, J. (After stating the facts.) 1. No principle of law is better settled than that, in the administration of an insolvent partnership estate, the assets of the firm must be applied to the satisfaction of the firm creditors to the exclusion of the creditors of the individual partners. *Hundley vs. Farris*, 103 Mo. 78, 15 S. W. 312; *Bank vs. Brenneisen*, 97 Mo. 148, 10 S. W. 884, and cases cited in each. The principle we think equally well settled by the more recent decisions of this court, as well as by the weight of judicial authority in other jurisdictions, that the assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith. *Sexton vs. Anderson*, 95 Mo. 380, 8 S. W. 564; *Reyburn vs. Mitchell*, 106 Mo. 365, 16 S. W. 592, and cases cited in each; *Seger vs. Thomas*, 107 Mo. 635, 18 S. W. 33. As *Phelps vs. McNeely*, 66 Mo. 555, 27 Am. Rep. 398, is in conflict with the cases last cited and the great weight of authority, it should not be followed, and is overruled. *Jones vs. Lusk*, 2 Metc. (Ky.) 356; *George vs. Wamsley*, 64 Iowa 175, 20 N. W. 1; *Schaeffer vs. Fithian*, 17 Ind. 463; *Kirby vs. Schoonmaker*, 3 Barb. Ch. 46, 49 Am. Dec. 160; *Kennedy vs. Bank*, 23 Hun, 494; *In re Kahley*, 2 Biss. 383, Fed. Cas. No. 7,593; *Warren vs. Farmer*, 100 Ind. 593; *Trentman vs. Swartzell*, 85 Ind. 443; *Case vs. Beauregard*, 99 U. S. 119; *Purple vs. Farrington*, 119 Ind. 164, 21 N. E. 543; *Pepper vs. Peck*, 17 R. I. 55, 20 Atl. 16; *Anderson vs. Norton*, 15 Lea 14; *Huiskamp vs. Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899; *Coffin vs. Day*, 34 Fed. 687. In the case at bar the firm notes were given in satisfaction of individual debts long prior to the dissolution of the partnership, and that transaction cannot be declared fraudulent at law on the ground simply that the firm was at the time insolvent, or was made so by the act of making these notes.

2. If the partners composing the firm of Edwards & Wigginton had by agreement, in good faith, mortgaged or assigned all the assets of the firm, for the purpose of securing or paying the debts owing by them individually to McCune and Wigginton, respectively, though with the intention of giving them a preference over the firm creditors, the transaction could not be

impeached. If, on the other hand, they had given these individual creditors a mortgage on the firm property, and to secure their individual debts, with the understanding that they should continue in possession of the property, and sell and dispose of it in the usual course of business, the mortgage would have been fraudulent and void as to the other creditors. The object in giving these notes in the name of the firm to McCune and Wigginton was not to give them a preference over the partnership creditors, but was to put them all on an equal footing, so that they might share alike in the distribution of the firm's assets in case of the firm's assignment. So long as a firm exists, it has the same right to dispose of the firm assets that an individual has of his own property, providing always that such disposition is *bona fide;* but, if no lien has been created by it on its firm assets, and the firm assigns, as in the case at bar, then the firm creditors must be first paid. That the debts of McCune and Wigginton, when first created, were the individual debts of the members of the firm of McCune & Wigginton, seems clear. "Where there is a separate loan of money to one of several joint adventurers for the purpose of founding a partnership or joint adventure, the firm, when formed, will not be liable for the advance, for the case is not distinguishable from one where several persons are to contribute their separate proportions of money towards a common fund for joint purposes, and each is to borrow and does borrow his own share upon his own separate account and credit. In short, in all cases of this sort, in order to bind the firm, the intended partner must either have had an original authority to purchase goods or borrow money upon the joint account, and have exercised that authority by a purchase or loan on their account; and not on his own exclusive credit, or the transaction must have been subsequently ratified and adopted by the firm as one for which they were originally liable, or for which they now elect to give their joint security." Story, Partn. § 148. See, also, *Donally vs. Ryan*, 41 Pa. St. 306; *Wild vs. Erath*, 27 La. Ann. 171. The doctrine that firm assets must be first appplied to the payment of the firm's debts is a principle of administration adopted by the courts when from any cause they are called upon to wind up the firm business, and find that the members have made no disposition or charge upon its assets. This is

accomplished by marshalling the assets, by applying the partnership property to the partnership debts. The right of the firm creditors "is worked out through the partners," the meaning of which is that they may demand the primary application of the firm assets to the payment of their debts. *Schmidlapp vs. Currie*, 55 Miss. 597, 30 Am. Rep. 530. As the right of the firm creditors is "worked out through the partners," it necessarily follows that whatever the firm, with the consent of all its members, does in good faith with the partnership property, is binding upon them. If, then, the firm had the right to assume, by and with the consent of both of its members, the individual debts due by them respectively to McCune and Wigginton, when this was done, and they gave the firm notes, and thereby assumed their payment, they became firm debts, and should share *pro rata* in the distribution of the proceeds arising from the sale of the partnership assets with the other firm creditors. This is said to be the conversion of debts, so that, if they were separate debts of the respective partners, they become, by the consent of the members of the firm, the joint debts of all the partners, and will thereafter be treated as such. Story, Partn. §§ 368, 369; *Ex parte Peele*, 6 Ves. 601; *Ex parte Jackson*, 1 Ves. Jr. 131; *Siegel vs. Chidsey*, 28 Pa. St. 279. That the firm had the right to assume the individual debts of its members and thereby convert them into debts of the firm, in the absence of fraud, and that the individual indebtedness was sufficient consideration for such promise by the firm, the authorities abundantly show. *Siegel vs. Chidsey, supra; Case vs. Ellis* (Ind. App.) 30 N. E. 907. From these considerations we are of the opinion the judgment of the court of appeals should be reversed, and the cause remanded to that court, with directions to reverse the judgment of the circuit court, and remand the cause for a new trial in conformity with the opinion of this court. It is so ordered.

All concur.

NOTE: See Mechem's Elem. of Partn., § 388, and cases there cited.

# JACKSON BANK vs. DURFEY, *et al.*

*Supreme Court of Mississippi. 1895.*

72 Miss. 971, 18 So. 456.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Bill by Jackson Bank against R. W. Durfey and others to set aside two deeds of trust. There was a decree for defendants and plaintiff appeals. Reversed.

*Nugent & McWillie* for appellant.

*E. E. Baldwin* and *Williamson & Potter*, for appellees.

COOPER, C. J. The appellant, a firm creditor of the appellees, Durfey & Ascher, exhibited its bill in chancery, seeking to annul as fraudulent two certain deeds of trust whereby the firm assets were incumbered to secure the individual debts of the partners. The evidence, fairly construed, discloses these facts: Durfey, one of the partners, was indebted to the defendant Caldwell in the sum of $5,000, and Ascher, the other partner, was indebted to Hart in the sum of $5,550. The firm and the individuals composing it were insolvent. On October 3d, Durfey executed a deed of trust on all property owned by him individually and upon his individual half interest in certain property, specifically described, owned by the firm, to secure the debt due by him to Caldwell. On the same day Ascher executed a deed of trust conveying his individual property and his individual half interest in certain property specifically described, owned by the firm, to secure the debt due by him to Hart. The book accounts, and certain horses which had been bought for resale, were not included in the conveyance; but the stock kept in livery, the carriages, feed, and other appurtenances, were all incumbered. Forfeiture of both conveyances was fixed for the same date,—January 1st following,—at which time, the secured debts remaining unpaid, the trustees

were authorized and directed to make sale of the mortgaged property, and out of its proceeds to pay the secured debts. The members of the firm testified that they expected, by the collection of the outstanding book accounts, by the sale of the stock not included in the deeds, and from the profits of the business, to pay the firm debts; but a careful consideration of the evidence satisfies us that at the time the deeds were executed the firm and its members were hopelessly insolvent, and that no expectation could reasonably have been entertained that the firm debts could be paid after the firm property had been devoted to the individual debts of the partners. What followed the execution of the deeds was at best the struggle of men hoping against hope, and postponing for a short time the inevitable end.

The issue is thus sharply presented whether it is lawful for the members of an insolvent firm to convert the joint estate to the individual debts of its members, leaving the firm debts unpaid. The question has never, so far as we are advised, been before the court, though expressions may be found, suggestive of the inclination of some of the judges who have been members of the court, that the dominion of the partners over firm property is not limited by the existence of firm debts and the insolvency of the firm. In *Schmidlapp vs. Currie*, 55 Miss. 597,—a case of a solvent firm,—Judge Chalmers, while carefully limiting the decision to the question involved (*i. e.* the right of a solvent firm to devote firm assets to the payment of the debts of one of the members), cites with apparent approval the cases of *Rice vs. Barnard*, 20 Vt. 479; *Bank vs. Sprague*, 20 N. J. Eq. 14; *Allen vs. Center Valley Co.*, 21 Conn. 130; and *Sigler vs. Bank*, 8 Ohio St. 511,—which clearly hold that an insolvent firm may devote firm assets to the debts of its individual members; and also *Whitton vs. Smith*, Freem. Ch. (Miss.) 231; *Freeman vs. Stewart*, 41 Miss. 139; *Carter vs. Beaman*, 6 Jones (N. C.) 44; *Ex parte Ruffin*, 6 Ves. 119; and *Campbell vs. Mullett*, 2 Swanst. Ch. 550,—which are sometimes cited as supporting the same view.

In *Bank vs. Klein*, 64 Miss. 141, 8 South. 208, it was sought by the creditors of a banking firm to subject to their demands the proceeds of certain life policies upon the life of one of the members in favor of his wife, the premiums on which the bill

averred had been paid with firm money while the bank was insolvent. The answer denied the insolvency of the firm at the time the premiums were paid, and there was no evidence on the point. The case was decided on this point. Judge Arnold, however, in delivering the opinion of the court, gave expression to an emphatic dictum, that the insolvency of the firm and its members would not have changed the result. In addition to the cases cited by Judge Chalmers in *Schmidlapp vs. Currie*, he referred to the cases of *Case vs. Beauregard*, 99 U. S. 119, and *Rooch vs. Brannen*, 57 Miss. 490. In neither *Whitton vs. Smith*, Freem. Ch. (Miss.) 231; *Freeman vs. Stewart*, 41 Miss. 139; *Rooch vs. Brannen*, 57 Miss. 490; *Schmidlapp vs. Currie*, 55 Miss. 597; nor *Bank vs. Klein*, *supra*,—was the question now involved presented for decision. In all of these the nature of the rights of partnership creditors to resort to firm assets for the satisfaction of their demands was considered, and the decisions in the cases in which the point was involved show that the right, being a derivative one, and resting on the rights of the partners, had been lost by the waiver of the partners, under the circumstances of the particular cases. The question involved is *res nova* in this state, and we deal with it as such.

The authorities, with practical uniformity, agree that the right of partnership creditors to have the partnership property applied to the payment of partnership debts is a derivative one, resting upon the equities of the partners as between each other. The conflict of decision arises with the question whether the partners may, by convention, waive their rights, and convert the joint estate into severalty, thus subjecting it to the debts of the individual members, or, by direct appropriation, apply the joint estate to such debts. It is quite generally held that this may be done so long as the partnership is solvent, and a going concern. Some courts seem to hold that if the partnership, though insolvent, is yet engaged in the prosecution of its business, it may thus deal with the partnership estate; and others, that this may be done even though the partnership is insolvent, contemplates dissolution, and converts the joint into separate estates for the purpose of applying it to the individual debts of its members.

In *Case vs. Beauregard*, 99 U. S. 119, the insolvent members of an insolvent firm had applied all the partnership prop-

erty to the payment of their respective individual debts. The firm creditors sought to subject it to their demands, but relief was denied upon the ground that the right of firm creditors was a derivative one, and could not be enforced except so long as the partners themselves retained their liens upon the property. Speaking on the precise point, the court said: "The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors; a fraud which those partners could waive, and which was subsequently waived by the act of fusion."

The clear effect of this decision is that it is not a fraud upon partnership creditors for an insolvent firm to devote the joint estate to the payment of the separate debts of the partners, leaving no provision for the firm creditors. In no other case we have seen has the question been presented where the conversion of the whole assets into separate estates or the devotion of all of them to individual debts was involved. The reasoning of other courts, however, in the following cases, would seem to conduct to the same conclusion as that reached in *Case vs. Beauregard*: *Sigler vs. Bank*, 8 Ohio St. 511; *Rice vs. Barnard*, 20 Vt. 479; *Allen vs. Center Valley Co.*, 21 Conn. 130; *Winslow vs. Wallace*, 116 Ind. 324, 17 N. E. 923; *Purple vs. Farrington* (Ind. Sup.) 21 N. E. 543; *Fletcher vs. Sharpe* (*Lanier vs. Wallace;* Ind. Sup.) 17 N. E. 923. See, also, other cases, probably holding to the same effect, cited in notes to section 560, 1 Bates, Partn.

But the decided weight of authority is that, while the right of firm creditors to go against the firm property in postponement of the right of creditors of the individual members is a derivative right, and rests on the right of the members of the firm, and while that right is lost by the *bona fide* waiver of their rights by the partners, it is not lawful for the members of the firm, in contemplation of insolvency, to divert the firm property, and apply it to the payment of the debts of the individual members, or to convert the joint estate into estates in severalty, to

prevent its being seized by firm creditors. *Ex parte Mayou*, 4 De Gex. J. & S. 664; *Ex parte Snowball*, 7 App. Cas. 534; *Cron vs. Cron's Estate*, 56 Mich. 8, 22 N. W. 94; *Cribb vs. Morse*, 77 Wis. 322, 46 N. W. 126; *Willis vs. Bumner*, 60 Wis. 622, 19 N. W. 403; *Menagh vs. Whitwell*, 52 N. Y. 146; *Phelps vs. McNeely*, 66 Mo. 554; *Reyburn vs. Mitchell*, 106 Mo. 365, 16 S. W. 592; *Roop vs. Herron*, 15 Neb. 73, 17 N. W. 353; *Arnold vs. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93; *Darby vs. Gilligan*, 33 W. Va. 246, 10 S. E. 400; *Shackelford vs. Shackelford*, 32 Grat. 503; *Bank vs. Sprague*, 21 N. J. Eq. 530; *French vs. Lovejoy*, 12 N. H. 458; *Flack vs. Charron*, 29 Md. 311; *Clements vs. Jessup*, 36 N. J. Eq. 569; *Elliott vs. Stevens*, 38 N. H. 311; *Gallagher's Appeal*, 114 Pa. St. 353, 7 Atl. 237; *Patterson vs. Seaton*, 70 Iowa 689, 28 N. W. 598; J. Pars. Partn. § 196; Bates, Partn. § 563; Jones, Mortg. §§ 19–23; Beach, Mod. Eq. §§ 707, 788; Hare &. W. note to *Silk vs. Prime*, 2 White & T. Lead. Cas. Eq. pt. 1, 353.

The principle controlling in these cases is stated with precision by Judge Dixon, delivering the opinion of the court in *Arnold vs. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93. We quote from that opinion at large, as we adopt and affirm the reasoning of the court: "In equity, a partnership is for some purposes deemed a single entity. Thus, when partnership property invested in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and it is used first to liquidate the debts, and only the surplus, if any, is surrendered to the individual partners. This equitable practice rests upon the presumed intentions of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord Eldon in *Ex parte Ruffin*, 6 Ves. 119, it has been generally held that the partners could put an end to their right, and that if, by their agreement, the partnership is dissolved, and its property is assigned to one of their members or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct."

"Growing out of this right of partners, has arisen a corresponding equity in partnership creditors to have their debts

first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally, it may be said that this equity of creditors continues only so long as the right of the partners against each other subsists, and perishes when that terminates; but this is not universally true, for this equity may survive the right to which it is ordinarily attached. In this respect it resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is ordinarily but a right, by lawful procedure, to acquire a lien during the ownership of the debtor. Yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has aliened his property, with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of bona fide purchasers, for good consideration, without notice."

"Equity applies this statute to a partnership, its property and creditors, just as it would in the case of an individual; and therefore, while it is generally true that a partnership may defeat the equity of its creditors by the alienation of its property, and subsequent extinguishment of the right of its partners *inter sese*, yet, if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects." In *Clements vs. Jessup*, 36 N. J. Eq. 569, it was said: "Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all of the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts."

The recognition of this equity in favor of firm creditors does not impair any proper exercise of the power of the partnership over its property or affairs, nor bring within the control of a court of equity all partnerships which are insolvent in fact, or

in a condition of temporary inability to meet their obligations. The apprehension of this result seems to have been influential in leading the court, in *Sigler vs. Bank*, 8 Ohio St. 511, to adopt the opposing view. But the statute against fraudulent conveyances does not operate to control the lawful dominion of individuals, though insolvent, over their property; nor does mere insolvency confer jurisdiction upon equity to take charge of and administer their estates. And yet it cannot be denied that the statute does restrain the insolvent from disposing of his estate for the purpose of withdrawing it from liability to his creditors. Why should a different rule be applied to an aggregation of individuals than to them separately? The inquiry must in either case be whether the purpose and effect of the act is lawful, and it may be done by the individual or by a firm; if unlawful the act is equally void, as to the creditors injured, whether it be done by the one or the other.

But, it is again said that it cannot be a fraud for one to devote whatever right or property he has to the payment of an honest debt. This is true if one devotes his own property to his own debts; but is it not a fraud in law if A. appropriates his property to pay B's debt, leaving his own unpaid? Take the case at bar. Durfey & Ascher appropriated one half of their joint estate to pay Ascher's debt. Now, if this was all that had been done, it would be manifest that the creditors of Durfey could treat the conveyance as fraudulent, because it would have been a clear donation by Durfey to the creditors of Ascher, at the expense of his creditors, he being insolvent. But it is said that Ascher at the same time conveyed his interest in the other half of the joint estate to the creditors of Durfey, and so each conveyance became a consideration of the other, and each partner received a full consideration for his release of his right as a partner. The reply is that a full consideration does not make a contract otherwise unlawful valid. If A. agrees to do one unlawful act if B. will do another, of what avail is it that each should reap a benefit from such an act of the other? Durfey had a right to have the partnership property applied to the partnership debts, and Ascher had a like right. While these reciprocal rights existed, they were of value as property rights of the debtors to a certain class of creditors; i. e. firm creditors. Now, it is manifest that for the very satisfaction of

their demands the rights themselves are waived, and attempted to be obliterated.

We are unable to perceive any just principle upon which the right of a debtor can be recognized to thus deal with his estate for the very purpose of obstructing his creditors. It is to be noted, also, that neither partner could make a cent by the transaction. Five thousand dollars' worth of property will pay only $5,000 of debts, whether its proceeds be applied to partnership or individual liabilities. The partners would, in either event, after the payment of debts of either class, owe precisely the same sums. To permit the consummation of the scheme would be of no benefit to them. Its sole effect would be to withdraw the property from one class of creditors who had created the joint estate, had given credit on the faith of it, and had a right to resort to it, and to permit its appropriation to another class, who dealt with the individuals composing the firm, with a full knowledge that all they could get out of the partnership assets was what remained after payment of the debts. The complainant is entitled to the relief prayed by its bill. The decree is reversed, and cause remanded.

NOTE.—See Mechem's Elem. of Partn. § 288.

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## DIVINE vs. MITCHUM.

*Court of Appeals of Kentucky, 1844.*

4 B. Monroe (Ky.) 488, 41 Am. Dec. 241.

Error to the Woodford circuit.

Judge BRECK delivered the opinion of the court.

William Oldham and John Mitchum, in 1833, made a joint purchase of a lot, in the town of Versailles, with a steam mill and cotton factory thereon, and engaged as partners, under the firm and style of Oldham & Mitchum, in the manufacture of flour and meal and cotton yarns. Mitchum, for large advancements alleged to have been made, for and on account of the partnership, and in the purchase of the property, claims a prior lien upon it, over the mortgagees and attaching creditors of Oldham for his individual liabilities. The validity of the claim

thus set up by Mitchum constitutes the important question for determination.

The facts as to the advancements by Mitchum, for the firm, in the prosecution of the partnership business, and in the purchase of the property in contest, and also as to the validity of the claims, as against Oldham individually, asserted by his mortgagees and attaching creditors, having been agreed by the parties, the next inquiry is whether the property belonged to the firm as partnership property?

The proof is that it was a joint purchase of the property, each paying an equal proportion of the purchase money, except as to about $600 of Oldham's half, for which he and Mitchum gave their notes, the latter as security, and which were subsequently paid, in part, by the firm, and the residue by Mitchum.

The conveyance was made to them jointly. Mitchum alleges that the property was joint stock property, and belonged to the firm of Oldham & Mitchum. This allegation is not denied by the adverse claimant. The fact is agreed, on the part of the mortgagees, that at the date of the mortgage they knew the property was used as joint property of the firm of Oldham & Mitchum.

In view of all the facts and circumstances, without farther inquiry, we think it may be assumed that the property was purchased with a view to constitute it joint stock of the firm, and that it was so considered, treated and held.

Regarding it as such, has Mitchum a prior lien upon it to be reimbursed for his advancements before the mortgagees and individual creditors of Oldham can come in? The question, we apprehend, has not been decided by this Court, and so far as it depends upon a concurrance of authority elsewhere may be regarded as unsettled.

That one partner has an equitable right to have his own claims upon the firm, for advancement and also all the firm debts, discharged out of the personal estate of the firm, before the assignee or separate creditor of the other partner can come in, has long been recognized as the settled law. But whether this equitable rule should be applied to the real estate of partners, is a question upon which there have been conflicting opinions and decisions, both in England and this country. Of eminent English chancellors Lord Thurlow has been on one side

and Lord Eldon upon the other of this vexed question. The former is reported at first to have said, in the case of *Thornton vs. Dixon*, (3 Br. Ch. Rep. 198) "he had always understood that when partners bought lands for the purpose of a partnership concern it was to be considered as part of the partnership fund," and that consequently the real estate in that case must be considered as personal estate, and distributable as such. Upon reargument, however, his lordship changed his opinion. The contest in that case was in reference to land upon which mills had been erected for partnership purposes, the partners being paper makers. The property was used in the business of the concern, and was, therefore, like the one under consideration, a very strong case in favor of the principle of regarding the property as personal estate. The question in the case referred to arose between the surviving partners and the representatives of a deceased partner. *Balmain vs. Shore*, 9 Vesey, Jr. 500, and other English cases might be cited based upon the opinion of Lord Thurlow in *Thornton vs. Dixon.*

Lord Eldon is reported to have entertained a different opinion and to have said, in the case of *Selkrig vs. Davies*, 2 Dow 242, "that all property involved in a partnership concern ought to be considered as personal," and afterwards, in the case of *Towns, et al., vs. Devines, et al.*, reported in appendix to Montague on Partnership, so decided—*vide* note to the case of *Thornton vs. Dixon* and the authorities there referred to. This subject is also very fully examined by Gow on Partnership, 47–52, and the opinions and decisions of English and American jurists referred to. Also by Chancellor Kent (3 Kent's Commentaries, 37–45).

In America, the decisions upon the question have also been conflicting.

In New York, in *Coles vs. Coles* (15 John. 159)—and the same principle has been recognized in other cases—it was decided that the rules and principles which govern and regulate the disposition of partnership property, did not apply to real estate, and in the absence of special agreements between the parties, real estate owned by partners was to be considered and treated as such, without any reference to the partnership. A more qualified view of the subject has been taken by the judiciary of Virginia and Pennsylvania (in ***Forde vs. Herron***, 4

Munf. 316; *McDermot vs. Lawrence*, 7 S. & R. 438). In South Carolina and Connecticut real estate owned by partners is considered and treated as personal estate: *Winslow vs. Chiffele*, Harper's Equity Reports 19; *Robinson vs. Crowder*, 4 McCord 519; *Sigourney vs. Munn*, 7 Connecticut Reports 11.

The only plausible reason which we have anywhere seen advanced, for the distinction taken between the real and personal estate of partners, is that as to real estate the attention of the purchaser is directed to the record, which is presumed to furnish correct information as to title. But not so as to personal estate, the title and right to which are presumed to be with the possession.

We will not undertake to decide that cases may not occur in which the reason assigned in favor of a *bona fide* purchaser, without notice, would not be entitled to weighty and controlling consideration. But we are of opinion this case is not of that character—the property in contest was used in the business of the firm—the partnership was constituted for the very purpose and object of using it. That it was in the possession and used as the joint property of the firm, was known to the mortgagees before they obtained their mortgage from Oldham. In view of the whole case, we are of opinion that the property in contest should be treated as personal estate and be first subjected to the payment of the claim of Mitchum, and such being the decree of the Court below, it is therefore affirmed.

NOTE.—See Mechem's Elements of Partn., § 278.

## RODGERS vs. MERANDA.

*Supreme Court of Ohio, 1857.*

7 Ohio St. 180.

The original proceeding was a petition for an order of distribution of the separate or individual assets of an insolvent debtor, as between separate and partnership creditors.

It appears from the record, that about the 13th of June, 1854, Peter Murray, an insolvent debtor, made an assignment of all his estate, real and personal, to the plaintiff, in trust for the payment of his individual creditors, in proportion to the amount of their respective demands. Though possessed of a large and valuable estate, it had been found insufficient to pay his separate debts and liabilities, in full. At the date of his failure and assignment, he was a partner with John W. Dever, in a mercantile firm, under the name and style of Dever & Murray; which firm had also become insolvent, and likewise Dever; and the firm had made an assignment of the partnership property and assets, about the same time, to John Meranda, one of the defendants, in trust for the payment of the joint debts or liabilities of the firm.

In this condition of affairs, the partnership creditors, although they had filed their claims with the assignee of the firm for their distributive shares out of the partnership property, claimed the right to be admitted to a participation in the dividends of the separate estate of Murray, *pari passu* with his individual creditors; while the latter denied the right, and insisted that his separate estate shall be applied to the satisfaction of his individual debts in preference to his partnership debts.

It appeared further, that Murray, besides advancing his part of the capital of the firm, also loaned money to the firm to a large amount, for which he held the obligation of the firm, which obligation, by the assignment of Murray, came into the hands of the plaintiff, who presented the same to the assignee of the firm, and claimed to have the same paid out of the assets of the firm, *pari passu* with the other partnership debts. The other creditors resisted this, and plaintiff asked an order of distribution to that effect out of partnership assets.

Defendants demurred to the petition. The court below sustained the demurrer, and gave judgment in favor of the defendants. And this petition in error is filed to review and reverse that judgment.

*W. White* and *S. & R. Mason*, for plaintiff.

*Anthony & Goode*, for defendant Meranda.

*Conover & Craighead*, for defendants Tracy, Irwin & Co.

BARTLEY, C. J. Two questions are presented for determination in this case. 1. The first is, whether in the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects; so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is the right of a partner to have the partnership property applied to the purposes of the firm; and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, *in equity*, only look to the surplus of the separate property of a partner, after the payment of his individual debts; and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund, after the satisfaction of the partnership creditors. The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a

primary liability attaches to the fund on which the credit was given—that in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility: 3 Kent Com. 65. And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner; and that there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively, which has been thus benefited by their transactions; *McCulloh vs. Dashiell*, 1 Harr. & Gill (Md.) 96, 18 Am. Dec. 271. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm; and also, those who contract with a partner in his separate capacity, place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

What then is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor, in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the very question is, whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of a partner is a rule of equality, does not still rid the subject of difficulty. For leaving the rule to stand, which gives the

preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors, is, perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and for the purposes of justice, became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens, that the separate debts are contracted to raise means to carry on the partnership business. Independent of this rule, the joint creditors have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive share in the surplus of the separate estate *of each of the several partners*, after the payment of the separate creditors of each. It is a rule of equity, that where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim upon that, and no other to depend on. And besides the advantage which the joint creditors have, arising from the fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark their all, or the chief part of their property, in it; and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them, which the separate creditors have not; they can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken, as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund,

and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid eighty per cent on their debts, out of the joint fund, to come in *pari passu* with the individual creditors of one of the partners, whose separate property will not pay twenty per cent to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors? It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property. And that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results, as a principle of equity, from the preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but the one.

It has been argued that partnership contracts are *several* as well as *joint*, and consequently have an equal legal right with separate creditors upon the individual property of a partner. But the right of partnership creditors against the separate property of individual partners in *proceedings at law*, is not in controversy. The question here relates to the *relative equitable rights* of two classes of creditors in the distribution of the estates of insolvents. Much of the confusion upon this subject has probably arisen from confounding the abstract rights of creditors in proceedings at law, with their relative rights to an equitable adjustment in marshalling the assets of insolvents in chancery.

The rule here adopted appears to have been followed in England for near a century and a half. We find it distinctly recognized in the case of *Ex parte Crowder*, 2 Vernon 706, decided in 1715. And in *Ex parte Cook*, 2 Peere Williams 500, Lord Chancellor KING declared it settled as a rule of conven-

ience in bankruptcy that joint creditors should be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate after paying the joint creditors, the share of each partner should be distributed to his separate creditors; and if, on the other hand, there should be a surplus of the separate estate of a partner after the satisfaction of his individual creditors, it should be applied to any deficiency of the joint funds in the satisfaction of the partnership debts. Lord HARDWICKE followed the same rule, in *Ex parte Hunter*, 1 Atkins 228. But it appears that in *Ex parte Hodgson*, 2 Bro. ch. c., decided in 1785, Lord THURLOW made an innovation on the rule in bankruptcy, declaring that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu* with the separate creditors. This ruling of Lord THURLOW appears to have had reference to proceedings at law, and in bankruptcy, for it is said that, consistently therewith, it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction on the order in bankruptcy. But how far this innovation went, in practice, to affect the ultimate rights of the parties, is wholly immaterial, inasmuch as Lord LOUGHBOROUGH, in *Ex parte Elton*, 3 Ves. Jr. 238, in the year 1796, restored the rule which previously prevailed, holding that the rule introduced by the case of Hodgson was inconvenient, inasmuch as every order which he passed in bankruptcy, giving a joint creditor a dividend out of the separate estate of a partner, would give rise to a bill in equity, on the part of the separate creditors, to restrain the order, and secure the application of the separate estate to the satisfaction of the separate debts; and although it was adjudged that a joint creditor might prove his claim under a separate commission, yet he could not receive any dividend therefrom, until the amount of his distribution in the joint fund could be ascertained, and the claims of the separate creditors satisfied. And the opinion of the Lord Chancellor, in this case, puts an end to the assertion, which has been sometimes made, that this rule was peculiar to proceedings in bankruptcy. Touching this, he said: "If it stands as a rule of law, we must

consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy, but *upon general equity*, that the joint estate is applicable to partnership debts, and the separate estate to the separate debts." Again, in speaking of the inconvenience of Lord THURLOW'S rule, he said, "What I order here to-day, sitting in bankruptcy, I shall forbid tomorrow, sitting in chancery; for it is quite of course to stop the dividend on a bill filed. *The plain rule of distribution is that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed.*"

Lord ELDON, with some characteristic doubts and misgivings, consistently followed this rule of his immediate predecessor: *Gray vs. Chiswell*, 9 Ves. 118; *Dutton vs. Morrison*, 17 Ves. 194, 207. And it has ever since remained the settled law of England, applicable, not simply to proceedings in bankruptcy, but as a general rule of equity, in the distribution of the assets of insolvents.

The supposition that this rule arose from any provision of the statutes concerning bankruptcy, in England, is a mistake; it was long and well settled as a rule of equity, before any statute was enacted touching this subject. It does not appear to have been sanctioned by any positive enactment until the statute of 6 Geo. IV, c. 16, § 16.

It is not a little remarkable that this rule of equity, so long settled and acted on in England, should have encountered so much opposition as it has in the courts of the several states in this country.

In Pennsylvania the rule was discarded, by a majority of the court, in the case of *Bell vs. Newman*, 5 Serg. & R. 78, decided in 1819. And the rule adopted in that case was that where a surviving partner dies indebted to partnership and also to individual creditors, and leaving joint assets and also separate assets, the separate creditors should receive as much out of the separate property as the joint creditors could receive from the separate portion or share of such partner in the joint property; and that, then, the balance of the separate property should be divided *pro rata* among both classes of creditors. This was placed partly on the ground of equity, and partly on the ground of a statute directing equality of distribution of the assets of deceased persons. Judge GIBSON, however, dissented, insisting

forcibly on the rule adopted in England, as a general principle founded in equity.

And it has been insisted that this case did not strictly fall within the application of the principle, inasmuch as the estate to be distributed in that case was the estate of a surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. And Chief Justice TILGHMAN remarked, in the opinion in the case, that "no rule was intended to be laid down which may affect cases differently circumstanced."

The case of Sperry's Estate, 1 Ashmead (Pa.) 347, did not directly affect the question, inasmuch as it came fully within the exception, that where there is no joint fund, and no solvent partner, the separate and joint creditors should be paid ratably out of the separate estate. The question was again brought to the attention of the court in that state, in *Walker vs. Eyth*, 25 Pa. St. 216, where the court express the opinion that it is a rule of equity "that, where there are partnership and separate creditors, each estate should be applied exclusively to the payment of its own creditors, the joint estate to the joint creditors, and the separate estate to the separate creditors." But the question was not directly decided, the decision of the case being put upon another ground. So that the general principle, in a case proper for its application, is said to remain still an open question in Pennsylvania: 1 Amer. Leading Cases, 483.

In Virginia the question was presented in 1848, in the case of *Morris's Adm'r vs. Morris's Adm'r*, 4 Grattan 293, and was elaborately discussed on both sides, but the court was equally divided on the question of the adoption of the rule as a general rule of equity, and the decision of the case was put on other grounds.

In New Jersey, in the case of *Wisham vs. Lippincott*, 19 N. J. Eq. 353, the rule was doubted as a general principle of equity, although not decided.

In Vermont, in the case of *Bardwell vs. Perry*, 19 Vt. 292, 47 Am. Dec. 687, the rule was discarded as a principle of equity, with this qualification, that the separate creditors could require, in equity, that the joint creditors should first exhaust the partnership funds, before coming in with the separate creditors of a partner for a *pro rata* distribution out of his separate estate.

It does not appear that the doctrine of the English courts on

this subject was ever adopted as a rule of equity by the courts in Massachusetts; but it is said that a statute was enacted in that state, in 1838, providing, as a rule for the distribution of insolvents' estates, that the net proceeds of the separate estate shall go to the separate creditors, and that of the partnership estate to the joint creditors.

The rule appears to have been discarded in Connecticut, in the case of *Camp vs. Grant*, 21 Conn. 41, 54 Am. Dec. 321; and also in Mississippi, in the case of *Dahlgren vs. Duncan*, 7 Sm. & M. 280; but adopted in Alabama in *Bridge vs. McCullough*, 27 Ala. 661.

In New York it has been adjudged that "the rule of equity was uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything therefrom;" *Jackson vs. Cornell*, 1 Sandf. Ch. 348. The history of the English rule was somewhat reviewed by Chancellor KENT, in *Murray vs. Murray*, 5 John. (N. Y.) Ch. 60, and, upon full consideration, adopted as a rule of equity, by Chancellor WALWORTH, in *Wilder vs. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; *Payne vs. Matthews*, 6 Paige 19, 29 Am. Dec. 738; *Hutchinson vs. Smith*, 7 Ib. 26.

The same doctrine was adopted by Chancellor DESAUSSURE, in South Carolina, as early as 1811, in *Woddrop vs. Ward*, 3 Des. Eq. 203; and also by the Supreme Court of New Hampshire, in *Jarvis vs. Brooks*, 23 N. H. 136.

The subject was very fully reviewed in the Court of Appeals of Maryland, in *McCulloh vs. Dashiell*, 1 Harr. & Gill 96, 18 Am. Dec. 271, wherein it was settled in that State that in equity the individual creditors of a partner were entitled to a preference over the joint creditors in the distribution of the separate estate of their debtor.

And the same doctrine was settled by the Supreme Court of the United States, on full consideration, in *Murrill vs. Neill*, 8 How. 414. And it has been laid down generally by the elementary writers, both in England and in this country, as a settled rule of equity.

Story in his work on Partnership, ch. 15, §§ 365 and 366, says:

"This principle of equity jurisprudence, that the joint creditors shall be entitled to a priority of payment out of the joint effects, and the separate creditors to a like priority out of the separate effects, before the other class of creditors shall be entitled to any portion of the surplus, is not, perhaps, under all its aspects, so purely artificial, as it has sometimes been suggested to be; at least, it has been often relied upon, as the dictate of *natural justice.*"

It is true, the same author, in § 377, of his same work, qualifies this opinion as follows:

"'This rule, although now firmly established,' 'stands as much, if not more, upon the general ground of *authority*, and the maxim, *stare decisis*, than upon the ground of any equitable reasoning,' and further, that 'After the repeated doubts which have been expressed upon the subject by the most eminent judges, it is not, perhaps, too much to say that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence.'" And he adds:

"Such as it is, however, it is for the public repose that it should be left undisturbed, as it *may not be easy to substitute any other rule, which would uniformly work with perfect equality and equity* in the mass of intricate transactions connected with commercial operations."

Kent, in his Commentaries, 3 vol., 65, says: "The joint creditors have the primary claim upon the joint fund in the distribution of the assets of bankrupts or *insolvent* partners, and the partnership debts are to be settled before any division of the funds takes place. So far as partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. *The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts.* It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the

partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied."

It is argued, however, that this doctrine was overruled in Ohio, in the case of *Grosvenor vs. Austin*, 6 Ohio Rep. 104, 25 Am. Dec. 743. It is true, that the reasoning of the court in the opinion is to that effect; but the case decided falls within one of the acknowledged exceptions to the rule. Where the partnership has become insolvent, and there are no partnership assets for distribution, and no living solvent partner, it has been uniformly conceded that the principle of the rule does not apply. The case of *Grosvenor vs. Austin* was a bill in equity by the creditors of the firm of Seymour Austin & Calvin Austin, for a distributive share with the individual creditors of Seymour Austin out of the assets of his separate estate in the hands of his administrator. There were no partnership assets, and both parties had died insolvent. This was not a case, therefore, for the application of the principle under consideration, and Judge LANE, in delivering the opinion, says, as to this rule: "This Court are of opinion, that if any such rule exist, it must have been of frequent application, and thus have become familiar to the profession. Yet no case is found in the books, except the one in 9 Vesey, and the South Carolina case, that touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy," etc. Touching the subject of this *obiter* opinion, the following remarks of the Supreme Court of the United States, in *Murrill vs. Neill, supra*, are in point:

"The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the

separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety."

It has been argued that the statute in this State, relative to the equal distribution of the estates of deceased persons, and also the statute providing that all assignments of property in contemplation of insolvency, giving preferences to creditors, had established, in this State, a policy inconsistent with the rule in question. These statutes were certainly never intended to have such an effect. The equality required by them is subordinate to the settled equities and priorities of different grades and classes of creditors. It was manifestly not the design of these statutes to change the nature of partnership contracts, and abrogate the preference of partnership creditors in the distribution of the partnership assets. And as this was not done, the rule of equality adopted in equity, requires the corresponding preference to be given to the individual creditors of each partner in his separate estate.

2. The remaining matter for determination, in this case involves the inquiry, whether, in case of an indebtedness for money lent to the partnership by a partner who afterward becomes insolvent, the separate creditors of the latter shall be entitled therefor to a *pro rata* distribution with the partnership creditors, out of the joint fund. It is claimed that the liability of the firm to a partner for money loaned is a partnership debt, and that the individual creditors of that partner are, in equity, entitled to an equal distribution therefor, out of the partnership property. On the other hand, it is claimed that as each partner is individually liable for the debts of the firm, and as no partner can be allowed to participate with his own creditors in the distribution of a fund, the separate creditors of a partner, as they can only claim through the rights of their debtor, cannot be allowed such participation with the joint creditors.

It was at one time held to be the law, on the authority of adjudications by Lord TALBOT and Lord HARDWICKE, that if a partner has loaned money to the partnership, or the partnership has loaned money to the separate estate of one of the partners, according to the equitable rule of distribution of the assets after insolvency, in the former case, the separate creditors of the partner would be entitled to an equal share out of the joint assets to the extent of the debt created for the money lent; and that, in the latter case, the partnership creditors would be entitled to payment to the same extent, out of the individual estate of the partner: *Ex parte Hunter*, 1 Atk. 223; Story on Part., § 390. But this doctrine has long since been overruled; and the contrary appears now to be well settled. In *Ex parte Lodge*, 1 Ves. Jr. 166, Lord THURLOW held that the assignees on behalf of the joint estate could not be entitled to distribution out of the separate estate of Lodge, for money which he had abstracted from the partnership, unless he had taken it with a fraudulent intent to augment his separate estate. And in *Ex parte Harris*, 2 Ves. and Beam. 210, 212, Lord ELDON said: "There has long been an end of the law which prevailed in the time of Lord HARDWICKE, whose opinion appears to have been that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other, in each case. That has been put an end to, among other principles, upon this certainly, that a partner cannot come in competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is, that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so, if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case no proof to affect the creditors, though the individual partners may certainly have the right against each other."

This doctrine proceeds upon the principle that, in the distribution of the assets of insolvents, the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; that creditors can only step into the shoes of their immediate debtors in reaching their effects where there are conflicting claims; and that, inasmuch as an

individual partner could not himself come in and compete with the partnership creditors, who are in fact his own creditors, in the distribution of the fund, and thereby prejudice those who were not only creditors of the partnership but also of himself; therefore the separate creditors of a partner could not enforce any claim to a distributive share of the joint effects against the partnership creditors, which could not have been enforced by the partner himself for his own benefit. Story on Partnership, § 390. The rule, however, that these several funds are to be thus administered as they stood at the time of the insolvency, is to be received with this important limitation, that it does not apply in case, either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate estate, fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied.

In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray improperly. The separate creditors of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the common pleas reversed; and ordered that the separate effects of Peter Murray be distributed *pro rata* first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever & Murray; and that the partnership effects be applied first to the payment of the partnership debts, irrespective of the claim of the partner, Peter Murray, for money loaned by him to the firm.

All of the other justices concurred.

NOTE: See Mechem's Elem. of Partn., §§ 393, *et seq.*

Compare with the cases following.

See also, 2 Bates on Partn., § 825, where this case is referred to as the leading case, setting forth the reasons assigned for the various rulings. See also the note to *McCulloh vs. Dashiell*, 18 Am. Dec. 290, where *Rodgers vs. Meranda*, and many other cases are referred to.

## BLAIR vs. BLACK.

*Supreme Court of South Carolina, 1889.*

31 S. Car. 346, 9 S. E. Rep. 1033, 17 Am. St. Rep. 80.

Action to set aside an assignment for creditors as void because of preferences. Decree below for defendants and plaintiff appeals.

On January 29, 1889, James W. Black and Jacob K. Carpenter, of the old mercantile firm of Black & Carpenter, and also of its successor, Black, Carpenter & Davies, made an assignment of both their individual and partnership property for the payment of their debts to John G. Black, as assignee and trustee. J. L. Davies, one of the latter firm, did not sign the original deed of assignment, being absent at the time it was executed, but ratified it some days later, and indeed executed another deed, conforming substantially to the first. The assignment provided that the property and assets of the individual members of the respective firms should be first applied to the payment of the individual debts of the members of the firm, and that the property and assets of the firms, respectively, should be first applied to the debts of the partnership, and that if a surplus should remain after paying the debts of the one class, then such surplus should be paid to debts of the other class, and so reciprocally of the other class. The assignment also provided that, if there should not be sufficient funds to pay the debts, the assignee should pay them ratably, or such as should, with 30 days from the date of the assignment, agree to accept the terms of it, and to release the parties from all liability on their debts and claims, etc. The cases stated above were instituted by creditors of the respective firms for the purpose of setting aside the deed of assignment, and, being identical in object and purpose, were consolidated and heard together.

*C. E. Spencer* and *W. B. McCaw*, for appellants.

*Hart & Hart*, for appellees.

MCGOWAN, J. Several grounds were urged sufficient, as alleged, to set aside the assignment, and subject the property

to the claim of creditors according to law, but, from the view which the court takes, it will not be necessary to consider any of the objections except the one chiefly relied on by the assailing creditors, viz., that in violation of section 2014 of the general statutes, which denounces assignments giving preferences as "absolutely void," this assignment gives undue and illegal preference to individual over copartnership creditors, in excluding the partnership creditors, after exhausting the partnership assets, from coming in and participating with the individual creditors in the individual property of the members of the different firms; the proposition relied on being that, under the law of this state, the individual creditors are not entitled to be paid first out of the individual property, but have only an equity to require that the partnership creditor should exhaust the assets of the firm, and, after that is applied, they are then entitled, as to any balance due them, to share equally and ratably with the individual creditors in the individual assets. While, on the other hand, in support of the assignment, it is urged that the rule is that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and as to that possess a like preference, and the surplus only, after satisfying such priorities, can be reached by the other class of creditors, so that really the only question involved is one purely of law. What was the law of this state upon the subject when the assignment was executed?

The cause came on to be heard by Judge KERSHAW, who, making a full and interesting review of the authorities both in the English and American courts, in law and in equity, held that the question as to priority of the individual over the partnership creditors in the individual property of the members of the firm was still an open question in this state, and "furthermore that the departure from this settled rule of administration of partnership assets, where there are individual claims and individual property, is wholly founded upon the case of *Wardlaw vs. Gray*, Dud. (S. Car.) Eq. 110, and that wholly upon a total misconception of the English cases cited to support it. With great deference to the opinions of the eminent jurists whose decisions are here reviewed, I am impelled to the conclusion that in the case under consideration the individual

property is first applicable to the individual debts, and that the provisions upon that subject in the assignment are in strict conformity to the established rule, and therefore constitute no improper preference,"—and dismissed the complaints. From this decree the plaintiff's partnership creditors appeal to this court upon the ground, *inter alia*, that it was error of law to hold "that, as between the partnership creditors of a firm and the individual creditors of its members, the individual assets are first liable to individual debts before any application thereof may be made to partnership debts, and for not holding that if, after applying partnership assets to partnership debts, any portion of such debts should remain unsatisfied, such portion should come in ratably with the individual debts of the several members as against their individual assets," etc.

The question is certainly an important one, which in the affairs of business life may arise daily, and it should be, if it has not already been, clearly and fully settled, so that all may know what the law is to which their actions should be conformed. It is true that there has been much discussion and some difference of opinion on the subject involved, not, as it seems to us, arising so much from the inherent difficulty of the subject, as from an artificial rule originally adopted in the English bankrupt courts, mainly, as it would seem, on account of its simplicity and convenience of application, viz., that partnership creditors are entitled to partnership property, and *e converso*, individual creditors are entitled to individual property,—a rule of which Judge STORY says: "It is not too much to say that it rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence." Story, Partn. 577. As we understand it, no rule upon the subject has ever been declared by positive statute, either in England or America; but whatever rule there may be has grown up entirely from the *dicta* of elementary writers and adjudications of the courts supposed to be founded on some principle. But so far as concerns this "rule of reciprocity," as it is sometimes called, it does not seem to us to have been based upon any principle or general equities of the parties. All agree that the partnership creditors have an equity to exhaust the partnership assets, for the double reason that they have two funds, and the individual members have no interest until the partnership is settled. But the same cannot be said

of the individual creditors. They are not creditors of the firm at all, but only of their individual debtor, whose individual property, including his clear share of the firm, is liable for all his debts alike, both partnership and individual. It strikes us that there is nothing in the relations or the equities of the respective classes to authorize or justify the application of the convenient Procrustean rule of "reciprocity." But it is argued that the circuit decree is in conformity with the English rule, and we should follow it, without regard to its reason or equity, and disregard our own cases, which have made a departure from it, for the sole reason that it was error to make that departure, and it should be corrected by returning to the rule.

Without going back to ascertain what is the precise rule adopted in the English courts of bankruptcy and chancery, it is quite clear that, as far back as the case of *Wardlaw vs. Gray* (1837), cited in the circuit decree, the doctrine was announced in this state "that a partnership creditor has the right to resort either to the partnership property or to the separate property of the parties; but, as a party having two funds, he may be compelled by the separate creditors of one of the partners to exhaust the partnership property before he proceeds against that of an individual partner," etc. Whether this decision did or did not run counter to what is said to be the English rule upon the subject, it is quite as clear that it has never been expressly overruled; but on the contrary has been recognized and followed, and at the time of the execution of the assignment under consideration was, as we think, the law of the state. In *Gowan vs. Tunno*, Rich. (S. Car.) Eq. Cas. 369 (1832), it was held that, "though partnership effects should be first applied to partnership debts, yet, after these are exhausted, a judgment against the partners as such binds the separate estate of each partner from its date." In *Fleming vs. Billings*, 9 Rich. Eq. 149 (1856), it was held that "copartnership creditors are first to be paid out of the copartnership fund, and if that prove insufficient then they are to come in with the private creditors [respect being had to liens], as against the individual property of the copartners." In *Gadsden vs. Carson*, Id. 252, 77 Am. Dec. 207 (1857), it was held that "the individual creditors of a partner have not such exclusive right to be paid out of his individual property as to render fraudulent an assignment of it for the benefit of the creditors of the firm.

Partnership creditors having two funds to which they can resort, and individual creditors of the partners having but one,—the private property of the debtor, including any balance which may remain to him from the firm, after its affairs are settled,—such individual creditors have an equity to compel the partnership creditors to resort first to the partnership assets; but, after they are exhausted, the partnership creditors have as good right to be paid out of the private property of a partner as his individual creditors," etc. In this case Chancellor JOHNSTON remarked that it "was in conformity to *Wardlaw vs. Gray*, with which we see no reason to be dissatisfied." In *Wilson vs. McConnell*, 9 Rich. Eq. 500 (1857), it was held that "where a copartner, having a separate estate, dies, the copartnership creditors have the right first to exhaust the copartnership estate, and, if that proves insufficient to pay their demands, then they are to be paid from the separate estate of the copartners, *pro rata* with his separate creditors." In *Adickes vs. Lowry*, 15 S. C. 128 (1880), it is true that an intimation is given that the question might be still open, but that was not intended to decide anything. The remark was: "But, even if this were so, there would still remain the very important and interesting question whether the separate creditors of Bratton would not have in equity a preference over the partnership creditors to the separate assets of Bratton, etc. But inasmuch as this question was not raised in the court below, and has not been argued here, we do not propose to enter upon its consideration now," etc. In *Hutzler vs. Phillips*, 26 S. C. 136, 1 S. E. Rep. 502, 4 Am. St. Rep. 687 (1886), it was held "that partnership creditors, after exhausting partnership assets, are entitled to share the separate property of the partners *pro rata* with unsecured individual creditors." The chief justice reviewed all the authorities, saying, among other things: "We think the true doctrine is as stated by the circuit judge with respect to the right of the separate creditors, if any equity exists in his behalf, such as two funds * * * to throw the copartnership creditors on the partnership assets in the first instance; but, after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us. Besides a debt contracted by a copartnership is not only a debt of the firm, but a debt, in substance, of each individual

member of the firm, and the property of the firm and of each member is liable for it. But the property of the firm is not liable for the separate debt of a member; only the interest of the member is liable, which is nothing until the firm debts are paid," etc. We think this case finally settled the law in this state. But, as if to put the matter beyond all dispute, the very last work, upon the subject of partnership, published this year (1889), expressly approves and cites from this case, as containing the proper exposition of the law upon the subject, both on principle and authority. The author says: "The insolvent, by his inability to meet his liabilities, is not the less, but all the more, a debtor. He owes to his creditors, not the property itself, nor any other asset, but merely the price of the property. The debt is personal, without any lien or preference for its payment out of the debtor's estate. The individual partner is, however, not less liable for a firm debt than is the firm itself. The several liability of the partners is no less a constituent of the partnership obligation than is their joint obligation. Both spring from the root of partnership. The joint creditors, therefore, are entitled at law to share the separate estate of a partner with his individual creditors," etc. See Pars. Partn. § 108: citing *Hutzler vs. Phillips*, and other cases.

We have not the least idea that the parties intended to do anything wrong, but the assignment was not in conformity with the law as we understand it, and had the effect of creating preferences not allowed by law. The judgment of this court is that the judgment of the circuit court be reversed, and the cases remanded to the circuit court for such further proceedings as the parties may be advised, in accordance with the conclusions herein announced.

SIMPSON, C. J., and MCIVER, J., concur.

NOTE: See Mechem's Elem. of Partn., § 294, and cases cited.

## NORTHERN BANK OF KENTUCKY vs. KEIZER.

*Kentucky Court of Appeals, 1865.*

2 Duvall (Ky.), 169.

JUDGE ROBERTSON delivered the opinion of the court:

J. W. and W. C. Houghton, who had been partners in the manufacture of bagging and rope, and owned between them much more individual than partnership property, apprehending their inability to pay all their debts, on the 11th of January, 1862, assigned all their partnership and individual property to C. M. Keizer in trust, to apply the partnership property to the payment of their partnership debts, the individual property to the payment of their individual debts, and then to distribute among all the creditors, pro rata, the residue of the individual fund, if any should remain after full payment of the individual debts.

It appears that, under such a distribution, neither class of creditors would receive their whole debts, but that the per centage of the individual creditors would be much larger than that of the partnership creditors.

The trustee, apprehending difficulty, and wishing to avoid unnecessary responsibility, petitioned the circuit court of Fayette to direct the mode of distribution to which all the creditors should be adjudged as entitled.

The partnership creditors, in an answer and cross-petition charged that the assignment "was made in contemplation of insolvency to prefer one class of creditors, and, therefore, they prayed for a pro rata distribution of the entire trust-fund among all the creditors, without distinction of class."

The individual creditors demurred to that cross-petition, and the circuit sustained the demurrer.

That the assignment was made "in contemplation of insolvency" is not denied, and, consequently, if the distribution which it directs is not such as each class of the creditors was entitled to by law, it does, inconsistently with the spirit of the statute of 1856, prefer one set of creditors over another, and,

for that end, must be deemed unavailing, even though the apparent preference was not the voluntary choice of the assignors, but was dictated, as we may presume it was, by a belief that the law itself would make the same distribution, and, therefore, they could not, if they would, prevent it.

Then the only question is, does the law make the preferences prescribed by the assignment?

As to partnership property, equity gives to the partnership creditors priority over the individual creditors of the firm.

No doctrine of the modern common law is more conclusively settled, nor on more rational and consistent grounds.

The compensatory and reciprocal priority of the individual creditors, as to the individual property, though not, as the other, universally recognized, is, nevertheless, in our opinion, so well settled by both reason and preponderating adjudications as to entitle it to our recognition.

Each partner having an implied lien on the partnership property as a security for the payment of all the partnership debts, no individual creditor of any of the partners can subject his debtor's interest otherwise than *cum onere*, or, in other words, could not make his debtor's interest available until all partnership debts shall have been paid; and, on the equitable principle of subrogation, each partnership creditor is entitled to the same lien or priority.

This is the law and its reason.

Precisely the same reason does not apply to individual creditors claiming a priority as to the individual property.

But the principle of equality and the equitable doctrine of marshaling assets do apply to their case, and entitle them to say to the joint creditors "you have kept us out of the partnership effects, and we have a compensatory right to be indemnified out of the separate property of our individual debtors." This accords with the well-settled rule that, when one creditor has a right to resort to two funds, and another creditor is restricted either by him or the law to only one of them, the creditor so excluded from one fund has an equitable right to priority as to his only resource, *coextensively with his privation.* As to the principle and the extent of this rule as applicable to this case, there is some diversity among jurists, a small minority denying such priority to any extent, and a very large majority

concurring in its existence, and apparently to the whole extent of the individual property, if all of it shall become necessary for full payment of the individual indebtedness.

The ground occupied by that minority is, in our opinion, indefensible on either principle or authority; and that occupied by the majority is so well maintained by both principle and adjudged cases as to command the recognition of it as the only true ground *to some extent.*

But, between those extremists, we are satisfied, that, while one class is altogether wrong, the other class is not altogether right.

The *rationale* of the individual priority neither requires nor authorizes an extension of it, under all circumstances, to the whole of the individual property until the entire individual debt shall have been paid, nor the application of it at all when the partnership creditors *do not assert, but waive, their priority as to the partnership property, and thereby leave the whole estate, of all classes, unincumbered and subject to all creditors alike, without distinction of class.*

If the exhaustion, by the partnership creditors, of the partnership property, should pay only fifty per cent., and the individual property should be sufficient to pay the whole of the individual debts, why should the class having an unqualified right to resort to both funds be required to accept only half of their debt, and the class having a more restricted right be adjudged entitled to the whole of their debt? Were this the law, it would be an anomaly without either analogy or reason. But the doctrine of equal reprisal is the only one that is either consistent or sustained by controlling or satisfactory authority.

It is not true, as sometimes said, that the reason of those relative priorities is, that the partnership creditors trust the partnership property, and the individual creditors trust the individual property.

The truth is, that each class of creditors look to both classes of property, and, unless they conflict, each have a right to subject both individual and partnership property.

Looking at the philosophy of the law, we do not doubt that the individual priority exists to the extent of the individual loss when partnership effects are taken or claimed by partnership creditors, and that extends no further.

We are also satisfied that the few adjudged cases and many

*obiter* sayings, which, on a superficial analysis, might seem to carry it further, do so on no recognized or consistent principle, and in a very indefensible manner, and should not be regarded as settled authority in this court. We, therefore, feel that it is both our judicial privilege and duty to recognize and apply what, on a survey of multitudinous cases and dicta, we believe to be the true doctrine, which is, that, if partnership creditors exhaust the partnership estate without full payment, the individual creditors have the reciprocal right to make as much of their debt out of the individual estate, and if, then, any individual property should remain undisposed of, it shall be distributed *pari passu* among all the creditors, regardless of class.

Consequently, as the assignment in this case directs a distribution essentially different from that just defined as legally rightful among all the creditors, the distribution must be made according to law, as herein indicated.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

NOTE.—See Mechem's Elements of Partn., §§ 293, 294.

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## FAYETTE NATIONAL BANK OF LEXINGTON vs. KENNEY'S ASSIGNEE.

*Kentucky Court of Appeals, 1880.*

79 Ky. 133.

JUDGE PRYOR. The First National and Fayette National Banks at Lexington discounted, each, certain notes signed by the firm of H. Gilbert & Co., Thomas Mitchell, and S. P. Kenney. The notes read:

"$10,000. LEXINGTON, KY., Dec. 11th, 1877.

"One hundred and twenty days after date we, or either of us, jointly and severally, promise to pay to the order of the Fayette National Bank ten thousand dollars, with interest at the rate of eight per cent. per annum, from date until paid,

without defalcation, for value received, negotiable and payable at the Fayette National Bank of Lexington, Ky.

"(Signed) H. GILBERT & Co.,
"THOS. MITCHELL,
"S. P. KENNEY."

Thos. Mitchell and S. P. Kenney, whose names appear to these notes, were both members of the firm of H. Gilbert & Co. S. P. Kenney, on the 11th of March, 1878, executed a deed of trust to the appellee, J. H. Shropshire, for the payment, pro rata, of his creditors "in the order and with the preference only prescribed by law as to the liens of individual and partnership creditors." About the same time the firm of H. Gilbert & Co., becoming embarrassed, by an agreement with creditors assigned to the appellee the firm effects in trust, for firm creditors. In making a distribution of the assets of the firm of H. Gilbert & Co., the appellants, the Fayette National Bank and others, presented their claims, and received a pro rata dividend amounting to 31 per cent. The trustee Shropshire (appellee) having filed his petition in equity for the settlement of these trusts, the appellants, after receiving their dividends of the firm assets, presented their claims, and demanded of the assignee, Shropshire, their pro rata dividend of S. P. Kenney's assets in the distribution to be made to his (Kenney's) individual creditors. It is admitted that the individual estate of Kenney will only pay about 30 per cent. upon the claims against it, and as the appellants had received from the firm of H. Gilbert & Co. a greater dividend, the individual creditors of S. P. Kenney insisted that appellants could take nothing from Kenney's individual assets until the individual creditors had received as great a dividend as had been paid the appellants out of the firm assets. The chancellor below adjudging in favor of the individual creditors, the case is here on appeal from that judgment.

It is insisted by counsel for the appellants, that as the individual signatures of Mitchell and Kenney appear to these notes, that the obligation imposed on them both a partnership and an individual liability; "that the holders of the notes possess all the equities of both partnership and individual creditors." This is the single question to be considered in this case.

We are met at the threshold of the investigation with the suggestion that the purpose of requiring the individual signa-

tures of two of the members of the firm of H. Gilbert & Co. to the notes was to create both a partnership and an individual liability, so that the appellants could assert all the equities belonging to both classes of creditors. What the intention of the parties was at the time these notes were executed is to be gathered alone from the face of the instrument, and an agreement to the effect that the individual estate of the members of the firm should be liable will not be permitted to affect the equities of either partnership or individual creditors. If in a firm liability the firm creditor has received his part of the firm assets, the chancellor will close the hands of such a creditor until the individual creditor is made equal with him; so the question at last is, was this, as between the parties to the paper, the debt of the firm? This court, in the case of the *Northern Bank of Kentucky vs. Keizer* (2 Duvall), says: "It is not true, as sometimes said, that the reason of these relative priorities is that the partnership creditors trust the partnership property, and the individual creditors trust the individual property. The truth is, that each class of creditors look to both classes of property, and unless they conflict, each have a right to subject both the individual and partnership property." That the individual creditors of Kenney regarded the solvency of the firm and its business capital as an additional security to their claims to the extent of Kenney's interest in the firm, and the appellants looked to the individual as well as the firm assets for the payment of the several notes, we think are facts that may be safely assassumed.

There was certainly no lien created on the individual estate of Kenney by his signature to the notes, upon which distribution is sought, nor is it questioned that the parties had the right by contract to create liens that the chancellor could not impair or disregard, or strengthen their claims by having the name of a stranger to the firm as surety; but it is maintained that although Kenney is individually liable, because he is a member of the firm, still there is a legal right, or an equity, arising in favor of the partnership creditors in this case that would not have existed in the absence of Kenney's individual signature. It is conceded that a several and joint liability exists by reason of the firm signature, and that Kenney's individual estate could be subjected to the payment of the several debts, as well as his interest in the partnership; but having evinced a purpose to

make himself individually liable, and appellants having accepted the notes with Kenney's individual signature to them, that such a liability might be created, it is urged that he must be regarded in this equitable distribution of assets as both a partnership and an individual debtor. This we think he was without signing his name to the paper, and that the appellants were both partnership and individual creditors; but when, at their own instance, they were subrogated to the rights of the partners, and given an exclusive lien on the assets of the firm for the payment of their debts, when asking equity they will be required to do equity.

The chancellor would be reluctant to adopt such an unjust and unequal principle of distribution if no equitable rule existed with reference to the marshalling of assets, when, by reason of the lien of the partners, courts of equity have worked out a lien for partnership creditors, and when asked to do so, have given them a preference, because their claims were debts owing by the firm, and on condition that they should not participate in the distribution of the individual assets until the individual creditors, if any, are made equal with them, we are asked to discard this rule, and create other equities, for no other reason than that the individual name of a member of the firm appears to the note. The same obligation exists to pay, and the same assets, firm and individual, are liable in either case, with or without the individual signature, and no conflict as to rights arises until the appellants have enforced an equity that gives them all the partnership assets to the exclusion of the individual creditor, and now insist that equity of the individual creditor is gone by reason of the agreement that the debtor was to be individually liable. That this is a partnership debt is evidenced by the fact that it has been presented to the commissioner or assignee, and the firm assets applied to its payment, and this, together with the position in which the names appear on the paper, authorizes such a conclusion. If the notes had been signed by each individual partner, reciting that it was for the benefit of the firm, could there be any doubt as to its being a partnership liability, and subject to all the equities of the partners in the distribution of the firm assets? The obligee, in such a case, if he desired, could assert his lien through the partners, and having done so, the chancellor would not give him this preference, and then permit him to share in the distribution of the individual assets

without accounting for what he had received from the firm. It is immaterial how the partner's name gets on the paper; if it is a partnership debt, and the firm primarily liable as between it and the individual partner, it is a firm liability, and if the creditor asserts his claim against the assets of the insolvent firm, he will be estopped to say that the equity of the individual creditor is to be disregarded, or that such an equity never existed, because the individual signing made the individual partner liable, either as principal or surety. A court of equity delighting in equality would strive to prevent such a distribution instead of seeking a mode for obtaining it.

Whether or not the rule in England against double proof in the administration of bankrupt estates is recognized as authority here, is not material to inquire. It is certain that, under the rule established in the case of the *Northern Bank of Kentucky vs. Keizer*, 2 Duvall, the firm creditor is entitled to distribution out of the individual estate of the debtor after the individual creditor has received as much as the firm creditor. The rule established in that case is:

1. That each partnership creditor, on the equitable principle of subrogation, is entitled to the same lien the partners have.

2. They are not compelled to assert, but may waive that priority, and thereby leave the whole estate subject to all creditors alike.

3. If the partnership creditors exhaust the partnership assets without being paid in full, the individual creditor has the right to make a like amount out of the individual assets, and when this is done, the individual estate remaining will be distributed among all the creditors (partnership and individual) in proportion to their respective debts.

This rule does not apply, of course, where the creditor has obtained liens by contract, or where strangers to the partnership are sureties for the firm, the chancellor having no greater right to disturb such liens and contracts than the common law judge; but one partner will not be allowed, by becoming a surety for a firm debt, to change the equitable doctrine of subrogation, so as to give the partnership creditor all the firm assets, and then allow him as much of the individual estate of the partners as his individual creditors receive in the distribution. The rule in Keizer's case is both just and equitable; and if the debt is that of the firm, as between it and the individual

partners, the position or manner in which the individual name of a partner appears on the paper is immaterial, and will not be permitted to disturb equitable rules so well understood in the settlement and distribution of insolvent estates.

*Northern Bank of Kentucky vs. Keizer*, 2 Duvall; *Hibler vs. Davis*, 13 Bush; *Logan vs. Anderson*, 18 B. Monroe. Judgment affirmed.

NOTE.—See Mechem's Elements of Partn., §§ 293, 294.

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## WINSLOW, *et al.* vs. WALLACE, *et al.*

*Supreme Court of Indiana. 1888.*

116 Ind. 325. 17 N. E. 923.

Appeal from superior court, Marion county; NAPOLEON B. TAYLOR, Judge.

*Baker, Hood & Hendricks*, for appellants.

*Harrison, Miller & Elam*, for appellees.

MITCHELL, J. Prior to the 15th day of July, 1884, Stoughton A. Fletcher, Thomas H. Sharpe, Ingram Fletcher, and Albert E. Fletcher were partners, carrying on a general banking business in the city of Indianapolis, under the firm name of Fletcher & Sharpe. The firm became insolvent, and upon the application of one of the partners William Wallace, Esq., was, on the date above mentioned, duly appointed by the superior court of Marion county to take charge of the assets of the firm as receiver.

During the pendency of the receivership, Winslow, Lanier & Co., Bankers, of the City of New York, filed an intervening petition in which they represented that the firm of Fletcher & Sharpe, was indebted to them in a large amount, which indebtedness was evidenced by two promissory notes executed by the firm, and secured by the separate endorsements of three of the partners individually. The intervenors asserted the right to participate ratably in the assets of the firm, and also to be preferentially paid any balance of their claim remaining unpaid, out of the proceeds of certain individual property which, they

averred, those members of the firm who had become liable as endorsers, had transferred to a trustee, for the benefit of the firm, prior to the declaration of insolvency, and which, it was alleged, had since been transferred to the receiver. There was a hearing upon issue taken, and upon due request the court found the facts specially, and stated conclusions of law thereon, adverse to the claim of the intervenors for a preference.

The only facts specially found material to the determination of the questions involved are, in substance, that on the 21st day of January, 1884, the persons above named, having carried on the banking business as partners under the firm name of Fletcher & Sharpe, for the period of 10 years or more, entered into a new partnership agreement, at which time, as subsequent events proved, the firm, as well as the individual members thereof, although owning a large amount of property, were of doubtful solvency, if they were not, indeed, actually insolvent. Two of the partners, viz., Ingram and Albert E. Fletcher, were each largely indebted to the firm, the debt of the first-named being $448,286, while that of the last-named amounted to $300,000 or thereabouts. Each of the above named partners owned a large amount of individual property, which they, as well as the other members of the firm, believed would sell for more than sufficient to pay the amounts due from them, respectively, to the firm.

It was accordingly stipulated, as part of the new agreement, that Ingram and Albert E. Fletcher should severally convey and transfer all their individual property, real and personal, to a trustee in trust, to be sold and converted into money by the firm, and the proceeds applied to the liquidation of their respective debts due the firm, and the residue, if any, placed to the credit of each as capital stock. It was also agreed that Thomas H. Sharpe, one of the partners, should convey the undivided one-half of a certain bank building owned by himself and the two Fletchers above named, as tenants in common, to the firm, subject to an incumbrance which it was stipulated the firm should pay. In pursuance of the agreement above mentioned, and upon the consideration therein named, and no other, the several partners, their respective wives joining, made conveyances of their individual real estate, according to the terms of the new agreement, the conveyance by Sharpe having been made to the firm on the 23d day of January, 1884, while the deeds from the Fletchers to the trustee were executed on the

2d day of February, 1884. The trustee subsequently conveyed the Fletcher property to the receiver.

The value of the property conveyed by Ingram and Albert E. Fletcher did not, in either case, equal the amount due from them, respectively, to the firm. The court finds that the conveyances were made in good faith, in order to provide for the payment of debts actually due the co-partnership from the several partners, and to enable the firm to pay its debts, and carry on its business. Afterwards, in April and June, 1884, Fletcher & Sharpe made two notes, one for $25,000, the other for $20,000, both payable to the firm of Fletcher & Sharpe. These notes were indorsed by the firm, whose indorsement was followed in regular course by that of Thomas H. Sharpe, Ingram Fletcher, and Albert E. Fletcher. Upon the note so indorsed, the intervenors, Winslow, Lanier & Co., loaned to the firm of Fletcher & Sharpe the amount of money specified in each note, respectively. The intervenors did not know of the conveyances above mentioned, made by the several partners to the firm of Fletcher & Sharpe at the time of making the loan, the indorsement of the partners having been accepted in order to obtain the security of their personal liability on the notes. No inquiry was made by Winslow, Lanier & Co. concerning the individual property of the several members of the firm of Fletcher & Sharpe, nor were there any representations made by any member of the latter firm in that regard. Subsequently a receiver was appointed by the Marion superior court, who took possession of all the property and assets of the firm, including the property conveyed to the firm, and to the receiver, as above mentioned, in pursuance of the partnership agreement made on the 21st day of January, 1884.

The question is whether or not, upon the foregoing facts, the intervenors were entitled to priority of payment over other firm creditors, out of the property conveyed to the firm by the several partners. There seems to be no dispute, as, indeed, there could not well be, upon the proposition that a creditor who holds a note of which a firm are the makers, and one or more members thereof indorsers, has in his hands a valid, joint obligation against the firm, and at the same time a distinct, several, and separate obligation against those who signed as indorsers. This result flows from the fact that the contract of an indorser is entirely independent and distinct from that of the maker, each contract being in itself, when the indorsement is in regular

course, conclusive in its legal import. The creditor holding a note so made and indorsed may therefore pursue his remedy against the partners as makers, and he may also proceed against those individually liable as indorsers. When the property of the firm, or the individual estates of the members bound as indorsers, is being judicially administered, the creditor is entitled to participate with the partnership creditors in the joint estate, and he may at the same time avail himself of any appropriate remedy he would otherwise have against the indorsers, or their respective estates. He may receive dividends from the joint estate as a partnership creditor and from the separate estate of the partners liable on their contract of indorsement, as an individual creditor. *Wilder vs. Keeler*, 3 Paige, 167-176; *Mead vs. Bank*, 6 Blatchf. 186; *Emery vs. Bank*, 3 Cliff. 507; *In re Bradley*, 2 Biss. 515; *In re Babcock*, 3 Story, 399. This is upon the principle that one who holds two independent obligations as security for a debt is entitled to avail himself of both until the debtor is once completely satisfied.

Having established the right of a creditor, who holds the note of a firm, indorsed by some or all of its members, to participate in the joint estate of the partners, to the exclusion of individual creditors, as well as in the separate estate of the indorsers, to the exclusion of partnership creditors, and resting their ultimate right for preference on this proposition, counsel for the intervenors plausibly contend that since the conveyances of their individual property, made by the several members of the firm of Fletcher & Sharpe in pursuance of the new partnership agreement, were intended merely as security for debts due from those members to the firm, such conveyances, although absolute in form, constituted in fact only mortgages. Therefore, it is said, the property thus conveyed remained the individual property of the several members, subject only to a mortgage in favor of the firm, notwithstanding the conveyances. Hence, the argument proceeds, the rights of the partnership creditors having become fixed and vested in the partnership property by the appointment of a receiver, the correlative rights of the individual creditors in the individual property, being compensatory, must have become fixed and vested in the individual property of the several members at the same time.

The conclusion is said to follow, since the intervenors, who occupy the double character of individual and partnership creditors, have thus obtained a vested right in or lien upon the indi-

vidual as well as the partnership property, that neither the insolvent firm of Fletcher & Sharpe, nor the receiver, will be bound to assert the prior mortgage in favor of the firm, upon the separate property of the individual members, as against the subsequent lien of the intervenors, who are also creditors of the firm. The joint creditors represented by the receiver, it is said, have no rights except such as they derive by subrogation from Fletcher & Sharpe, and since the latter could not have come into competition with the intervenors, their own creditors, in obtaining payment out of the individual property conveyed as above, their joint creditor cannot do so. It is undoubtedly true that a debtor will not be permitted to avail himself of a prior security, if to do so would defeat the collection of a debt which he is legally or equitably bound to pay.

Where property is incumbered as security for the payment of two debts, if the holder of the first lien is under a duty ultimately to pay the debt secured by the second, it would be manifestly inequitable to permit him, in case the property was insufficient to pay both, to set up the prior lien, to the discomfiture of his own creditor. Thus, if a partner borrow money on his individual security or credit, although for the use of the firm of which he is a member, while he might have a partner's lien *inter sese*, he has none against the firm creditors, because he himself owes the joint debts due the creditors of the firm. 2 Lindl. Partn. 683; *Ketchum vs. Durkee*, 1 Hoff. Ch. 538. Upon like principles, the assignee of the last series of notes secured by mortgage is entitled to preference over the mortgagee, who retains a prior note, in case the latter became liable for the payment of the last note by his contract of indorsement. *Wilbur vs. Buchanan*, 85 Ind. 42; 2 Jones, Mortg. § 1701.

The facts found by the court, however, do not make the present a case for the application of the principles above stated. Without conceding that the conveyance of their separate property by the individual members of the firm of Fletcher & Sharpe, in pursuance of the agreement above referred to, constituted mortgages merely, and dissenting entirely from the view that the appointment of a receiver of the assets of the firm in any way affected the relation of the individual creditors to the separate property of the several members, so as to give those creditors a vested right in or lien upon the separate property of the partners, yet, if these points were conceded to the intervenors, we are unable to see how it would aid their purpose, unless the conveyances referred

to were invalid and of no effect as against individual creditors. Whether the deeds operated as absolute conveyances, or as mortgages, there is no question but that they were executed some months prior to the appointment of the receiver, and before the intervenors became creditors either of the firm of Fletcher & Sharpe or of any of its individual members. Nor is there any dispute but that the conveyances were made either to pay or secure actual subsisting debts due from the owners of the property, respectively, to the copartnership.

The property having been transferred to secure the payment of *bona fide* debts due the firm long before the receiver was appointed as soon as a receiver was appointed it vested in him for the benefit of the creditors of the firm. The effect of the conveyances very clearly was to convert that which was theretofore individual property into property belonging to the firm. Debts due from the individual members of a partnership, like other debts due the firm, become assets in the hands of a receiver, who stands in some respect as assignee of the firm property, and are to be collected and applied to the payment of firm debts accordingly. If such debts are secured by mortgage, granting that the conveyances in question constituted mortgages only, or otherwise, the security, like the debt, stands for the benefit of the firm creditors, unless the security was taken in violation of the rights of individual creditors. The inquiry thus ultimately comes to this: is a conveyance of separate property, executed in good faith by a partner to secure a debt owing by him to the firm of which he is a member, valid as against the individual creditors of the partner? Upon principle and authority this question must be answered in the affirmative.

It is settled everywhere that when the assets of a partnership, or the individual property of the members of a firm, are brought under the jurisdiction of a court for judicial administration, the equitable rule of distribution will be applied, and the partnership assets will be devoted, first, to the payment of the firm debts, and the individual property of the several partners to their individual debts, respectively. But where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm. Thus, in *Fisher vs. Syfers*, 109 Ind. 514, 10 N. E. Rep. 306, this court said:

"Where debts are fairly owing by either partner individually,

the mere preference of individual over partnership creditors, by the execution of a chattel mortgage in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the chattel mortgage at the suit of the creditor." *Bank vs. Sprague*, 20 N. J. Eq. 13; *Kirby vs. Schoonaker*, 3 Barb. Ch. 46; *Kennedy vs. Bank*, 23 Hun, 494; Jones, Chat. Mortg. § 44; *In re Kahley*, 2 Biss. 383.

So, in the same decision, it is said: "The rule that obtains in the distribution of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners, respectively. Partnership creditors have no lien upon partnership property. Their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners." *Warren vs. Farmer*, 100 Ind. 593; *Trentman vs. Swartzell*, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit. Each has the right to waive his equitable lien, and together they may sell, assign, or mortgage the property of the firm to pay or secure either an individual debt of one of the partners or the debts of the firm.

The equity of the creditors is a derivative one, and arises out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners, so long as the right of any of the partners has not been waived. But the partners may waive their rights either in the partnership property or that owned by them individually. *Dunham vs. Hanna*, 18 Ind. 270; *Case vs. Beauregard*, 99 U. S. 119, and cases cited. It being thus settled that partners, while they remain in the possession and control of partnership property, and before it is brought under the jurisdiction of a court for administration, may create liens upon the property, or appropriate it to pay or secure the individual debts of the partners, the correlative right of an individual partner, to deal in like manner with his own separate property, and appropriate it to pay or secure his own

debts to the firm as a debt owing by the firm to a third person, would seem to follow as a matter of course.

Thus, in *Jackson vs. Cornell*, 1 Sandf. Ch. 348, speaking of a general assignment by an insolvent partner, in which the assignor gave preference to certain creditors of the firm, to the exclusion of his own, the vice-chancellor said: "Let the partner actually apply his own property as he thinks proper while he administers it himself, but when he avails himself of the lenient provisions of our law, which enables him to prefer such creditors as he pleases, on making an assignment, and to select his own trustee, let us require him to avoid violating the plainest principles of equity." This decision, while holding that a court of equity will neither tolerate nor administer a general assignment by a partner of his separate property, in which he prefers partnership over individual creditors, nevertheless fully recognizes the right of a partner to "apply his own property as he thinks proper, while he administers it himself."

The limitation upon the power of partners or of individuals to deal with or dispose of partnership or individual property while it remains in the possession and under the dominion of the owners, must in either case, be that the disposition or appropriation be honestly made, without any fraudulent intent to divert the property from the payment of their *bona fide* debts, as to injure their creditors, and with no purpose to secure some benefit to themselves, presumably, by the arrangement. That the disposition results in the payment of one *bona fide* debt to the exclusion of another creditor, whose demand is equally meritorious, is of no consequence. *Bedell vs. Chase*, 34 N. Y. 386; *Gregory vs. Harrington*, 33 Vt. 241; *Covanhovan vs. Hart*, 21 Pa. St. 495; *Smith vs. Selzer*, 114 Ind. 229, 16 N. E. Rep. 524.

Whatever a partner may do with his individual property in respect to paying or securing debts of the firm, it cannot be doubted that he has the right, as was done in the present case, to appropriate it to the payment or security of his own debt to the firm of which he is a member. We are thus led to the conclusion that the conveyances by the individual members of their separate property to the firm of Fletcher & Sharpe, whether those conveyances be regarded as having been made in payment of or as security for debts due the firm, or whether they be considered as advancements made by the several partners to the capital stock of the firm, were valid and effectual as against

individual creditors, to transfer a vested interest in the property thus conveyed to the firm as of the date on which the conveyances were executed.

Having seen that the conveyances in question were executed while the several partners were in control of and administering their own property, long before the assets of the firm came under judicial administration, and that the conveyances constituted valid transfers of the property therein described to the firm, it results that the individual property out of which the intervenors claim the right to be preferentially paid, was legitimately part of the assets of the firm of Fletcher & Sharpe when the receiver was appointed. The appointment of a receiver, the firm being insolvent, operated to all intents and purposes as an assignment of the firm assets, with all the securities incident thereto, for the benefit of the firm creditors. This being so, there is no principle of law or equity upon which it can now be said that the firm creditors shall be estopped to avail themselves of the benefit of property which the firm had the right to acquire, and which it had acquired (whether in payment or as security is immaterial) upon an adequate consideration paid.

Whether, in case the controversy were between the intervenors and Fletcher & Sharpe, the latter could be estopped to assert their prior right to the property in question, we do not now decide. Fletcher & Sharpe having become insolvent, and having in effect assigned their partnership effects for the benefit of their creditors, the receiver representing an equal equity, and, having the legal title in dispute, cannot be postponed to the claims of an individual creditor. Where the equities are equal, he is in the situation of advantage who holds the prior legal right. It is only necessary to say, in conclusion, that we have fully considered what has been said in relation to the fraudulent character of the conveyances referred to, as to future creditors, and without stating our reasons at large, our conclusion is that it does not appear, either in the facts found or in the evidence, that the contention of the intervenors in that respect is maintained. The conveyances seem to have been made in good faith for the benefit of the creditors, without any reservation or advantage to the grantor. The judgment is therefore affirmed, with costs.

NOTE.—See Mechem's Elem. of Partn. § 288.

This case is also cited as *Lanier vs. Wallace.*

## HARRIS vs. PEABODY.

*Supreme Court of Maine, 1881.*

73 Me. 262.

Bill in equity.

Royal Williams and James A. Norton, copartners under the firm name of Williams & Norton, upon their own petition, were individually and as copartners duly adjudged insolvent debtors. The assets of the partnership, amounting to one dollar and nineteen cents only, were absorbed by the expenses of selling the same. Norton's individual estate had no assets, while Williams', after deducting legal costs and charges, amounted to eleven hundred and seventy-seven dollars and thirty-six cents.

Against the partnership estate, claims amounting to more than twenty-two hundred dollars were proved; against Williams' individual estate eleven hundred and thirty-three dollars and sixty-seven cents; and against Norton's, no claims.

Before the court of insolvency the partnership creditors claimed a *pro rata* dividend from the separate estate of Williams *pari passu* with his individual creditors; but the judge denied the claim and decreed that the assignees should distribute those assets among the individual creditors. Thereupon the complainants brought this bill (claimed by them to be authorized by the insolvent statute of 1878, c. 74, sec. 11, as amended by stat. 1879, c. 154, sec. 3), somewhat in the nature of an appeal from the decree of the judge of insolvency; and the parties have brought the case before us on an agreed statement, reserving the question of jurisdiction of this court, which is expressly raised.

*William L. Putnam*, for the plaintiffs.

*George C. Hopkins*, *Charles P. Mattocks*, and *Strout & Holmes* and *E. P. Payson*, for different defendants.

VIRGIN, J. (After disposing of the question of jurisdiction, continues.) 2. The next question is, was the decree of the court of insolvency correct in ordering a distribution of Williams' individual assets among his separate creditors, to the

exclusion of the complainants, the creditors of the firm. The respondents rely upon the provisions of sec. 54, stat. 1878, c. 74, and certain cases cited of their brief.

It is familiar history that as early as 1715, Lord Ch. HARCOURT laid down as the rule of administering the joint and separate estates in bankruptcy, that the joint estate shall be applied in payment of the partnership debts, and the separate estate, of the separate debts, any surplus of either estate being carried over to the other. *Ex parte Crowder*, 2 Vern. 706. This doctrine was followed by Lord Ch. KING, in *Ex parte Cook*, 2 P. Wms. 500. But it seems that this rule was departed from by Lord THURLOW, who let in creditors of the firm concurrently with the separate creditors, upon the separate estate, upon the ground that they were equally creditors of the firm and of the partners. *Ex parte Cobham*, 1 Brown's Ch. 576; *Ex parte Hodgson*, 2 Brown's Ch. 5; *Ex parte Page*, 2 Brown's Ch. 119. The former rule was restored, however, by Lord LOUGHBOROUGH (*Ex parte Elton*, 3 Ves, 239; *Ex parte Abell*, 4 Ves 837), confirmed by Lord ELDON; (*Ex parte Clay*, 6 Vesey 813; *Ex parte Taitt*, 16 Ves. 193), and it has been the prevailing general rule ever since in England. Lindl. Part. (3d. En. ed.) 1201; Robs. Bank. 584; Colly. Part. (Perkins' ed.) 775-6; *Lodge vs. Pritchard*, 1 De G. G. and S. 609; and in this country as well. Among the numerous cases, see *Wilder vs. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; *Payne vs. Matthews*, 6 Paige 19, 29 Am. Dec. 738; *Murray vs. Murray*, 5 Johns. (N. Y.) Ch. 60; 3 Kent, 64, 65; Story Partn. secs. 376-378. *In re Marwick*, 2 Ware 233; Para. Partn. 480, *et seq.* and notes. This rule was also adopted in the U. S. Bankrupt Law, 1841 (5 U. S. stat. 440, 448, sec. 14); U. S. Bankrupt Law, 1867 (sec. 36, R. S., U. S. sec. 5121); in the Insolvent Laws of Massachusetts (1838, sec. 21), and in the Insolvent Laws of this state, stat. 1878, c. 74, sec. 54. *Jarvis vs. Brooks*, 23 N. H. 136.

This rule applies to the estates as they exist when the parties are declared bankrupt or insolvent, and not before; for the creditors of the firm have no lien upon its property which can prevent the partners from *bona fide* changing its character and converting it into the separate estate of one of them prior thereto. *Ex parte Ruffin*, 6 Ves. 119; *Case vs. Beauregard*, 99 U. S. 119, *ante; Robb vs. Mudge*, 14 Gray (Mass.) 534.

The reasons assigned for giving the partnership creditors the preference over the joint estate in bankruptcy have been vari-

ous. But the view generally taken founds it not upon any lien or superior claim which they primarily have, but upon a privilege or preference sometimes denominated a lien derived from the equitable right which each partner, who being liable for all the partnership debts and whose interest in its property being simply his share of the residue after payment of its debts and settlements of its accounts, consequently has that the partnership property shall go to pay its debts in preference to those of any individual partner. *Case vs. Beauregard, supra*; *Johnson vs. Hersey*, 70 Maine 74, 35 Am. Rep. 303; *Washburn vs. Bellows Falls Bank*, 19 Vt. 286, 288. It has also been said that this priority in joint assets and equality in the separate are founded on the fact that the partnership creditors trusted each and all the partners, while the separate creditor trusted but one; and that natural justice warrants the marshalling of the assets so as to give the former the preference. *Brock vs. Bateman*, 25 Ohio St. 609. That it is familiar law that a creditor of a partnership, having recovered a judgment against it, may satisfy his execution against partnership property or against the individual property of any of the partners (*Juchero vs. Astley*, 5 Cranch (U. S.) 84, 40; *Egery vs. Howard*, 64 Maine 68, 73; *Washburn vs. Bellows Falls Bank, supra*), and in the case of intervening insolvency, having two funds, from which to satisfy his claim, the principle familiar in marshalling assets or securities comes in and compels him to exhaust the fund to which he has the exclusive right before he be allowed to compete with a creditor who has a claim only on one of the funds. *Ex parte Elton*, 3 Ves. 240; 1 Story Eq. sec. 558. Lord Justice TURNER said: "This rule may perhaps proceed upon this: that the joint estate is clearly liable both at law and in equity for the joint debts, at law, by reason of the survivorship, and in equity by virtue of the rights of the partners, *inter se*, to have it so applied; and that the separate estate is as clearly liable, both at law and in equity, for the separate debts; and that the carrying over the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estate being liable for the separate debts only so far as the interest of the partners from whom the debts may be due may extend, and from the separate estates, if taken for the joint debts, having recourse over against the

joint estates, and which arise also from the equities between the parties." *Lodge vs. Pritchard, supra.* Prof. Parsons suggests the ground that a partnership is a distinct entity, contracting its own debts, having its own creditors, and possessing its own property applicable to its debts. That when it has ceased to exist, it is resolved into its elements, and the relations between its members and creditors arise. If the joint debts have been paid, the former partners share the remaining property. If the joint funds are not sufficient to pay its debts, they who were its members become the debtors of the joint creditors. Pars. Part. 346-7.

The rule that each estate is to be applied to its own debts, and the surplus of each to the creditors remaining of the other, is applicable only to the facts upon which it is predicated, *i. e.*, when there is joint estate, and all the partners are insolvent. But if there is no available joint estate and no solvent partner, then the creditors of the partnership have no exclusive fund to exhaust, but may share concurrently with the separate creditors the separate estate. *Ex parte Heyden,* 1 Brown's Ch. 454, and notes in Perkins' ed. 398; Colly. Part. sec. 926; Lindl. Part. 1234; Story Part. sec. 380; Pars. Part. 482. In some of the cases this is called an exception to the rule. Professor Parsons says that "instead of being an exception it is a case that falls without the rule." Others say that it is a part of the rule. Judge DRUMMOND, after stating what he denominates "the well established rule upon the subject," says: "It is partly on the ground that, although it is a debt of the firm, it is still a debt against each individual member of it, for the satisfaction of which the property of each is responsible; and that being the only source to resort to for the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members." *In re Knight,* 8 N. B. R. 436, 438. The same doctrine prevails in all the federal district courts. *In re Marwick,* 2 Ware 233; Bump, Bankruptcy (9th ed.) 771, and cases there cited. Such, evidently, is the opinion of Mr. Justice CLIFFORD. *Amsink vs. Bean,* 11 N. B. Reg. 495; S. C. 22 Wall. (U. S.) 395, and the cases of *Ex parte Leland,* which he cites there.

We are aware that this question has been decided otherwise in Massachusetts (*Howe vs. Lawrence,* 9 Cush. (Mass.) 553, 57 Am. Dec. 68, and *Som. P. Works vs. Minot,* 10 Cush. 592); but

the answer of Judge DRUMMOND is more satisfactory to our minds. *In re Knight, supra.* Neither does the dictum of Mr. Justice DANIEL outweigh the great weight of current authority. See also *Rodgers vs. Meranda*, 7 Ohio St. 179, *ante; Brock vs. Bateman*, 25 Ohio St. 609. It seems there were some joint assets, though not enough to pay the costs of selling; and hence (in the language of the statute) no "net proceeds." In such case, there should be considered no joint assets. Though when there are any available joint assets, however small in value, the rule is applicable. Lindl. Partn. 1235; Colly. Partn. sec. 926; Story Partn. sec. 380, says they must be enough to be "available." The question is thoroughly examined in *In re McEwen*, 12 N. B. R. 11. As recently as December, 1880, the question came before Judge CHOATE (S. D. N. Y.), who said: "It is, however, unnecessary to go into this question, because in a recent decision, which is conclusive on this court, the right of firm creditors to share *pari passu* with individual creditors in the individual estate has been recognized and enforced, where the firm, as well as the individual partners, had been adjudicated, and the firm assets were not more than sufficient to pay the costs and expenses properly chargeable to the firm estate. *In re Slocum*, D. C. Vt. Oct. 4, 1879; S. C. affirmed on review, by BLATCHFORD, C. J., December 13, 1880." *In re Litchfield*, 5 Fed. Rep. 47, 50.

Decree reversed. Decree that the partnership creditors of Williams & Norton are entitled to dividends from the assets of the estate of Royal Williams, *pari passu* with his separate creditors.

WALTON, BARROWS, LIBBY and SYMONDS, J.J., concurred.

APPLETON, C. J., did not concur.

NOTE: See Mechem's Elem. of Partn., § 295, and cases there cited.

## *In re* MARWICK.

*U. S. District Court, 1845.*

2 Ware 233, Fed. Cas. 9181.

This was a case of objection to a proof of a debt. Marwick, the bankrupt, in May, 1837, entered into a copartnership with one Frederick Davis, and as partners they purchased a quantity of provisions for the Georgia Lumber Company, to the amount of $800, for which they drew their bill on the company in favor of one Bradbury. Before the bill was paid, the company failed, and the failure of the company produced that of the copartnership of Marwick & Davis, by which the firm was dissolved. They afterwards gave their joint note for the sum remaining due, viz., $740.88. This note, Bradbury, for a valuable consideration, transferred to Dole, with notice that it was a partnership debt. The assignee of Marwick & Davis rendered in his account of the joint estate, Oct. 25, 1844, showing outstanding demands in favor of the firm to the amount of $13,000, which comprised the whole assets of the firm and which were all represented as utterly worthless. Dole, the creditor, proved his debt, June 17, 1842. The assignee, after rendering his first account, applied for liberty to compromise or sell the claim against the Georgia Lumber Company, which was disposed of for $40, of which a supplementary account was rendered, and the amount paid into court, April 25, 1845, to the credit of the joint estate. The final account of the assignee of the separate estate showed assets to the amount of $545.93. Two debts have been proved and allowed against the estate, one by Charles E. Marwick, for $684.04, and the debt of Dole. Marwick objected to the admission of Dole's debt against the separate estate.

WARE, District Judge.

Two questions have been raised and argued in the present case. The first is, whether the creditors of a copartnership can, in any case, be admitted to prove their claims against the

separate estate of one of the copartners, for the purpose of receiving dividends in concurrence with the separate creditors of the copartner. The second is, whether, admitting that they may in some cases, the partnership creditors can be admitted so to prove under the facts in this case.

The 14th section of the bankrupt act provides, when two or more persons become bankrupt who are partners in trade, that separate and distinct accounts shall be kept, in the settlement of their estates, of the joint effects of the firm and of the separate effects of the several partners, and when the whole expenses are paid, that the net proceeds of the joint property shall be applied to the payment of the joint creditors, and the separate property of each partner shall be applied to the payment of his separate creditors, and that the creditors of the respective estates shall be allowed to receive dividends from the other estate only after the creditors of that estate shall have been fully paid. This is in substance the rule established by the law, and it is quite clear where there is both a joint and separate estate, that the creditors of neither can prove against the other estate for the purpose of receiving dividends, except from the surplus remaining after its own proper creditors have been fully satisfied.

This general rule for marshaling the assets and claims is taken from the English bankrupt law. But under that system there are exceptions, as well established as the rule itself. One of these exceptions is where there is no joint estate and no living solvent partner, as is the fact in the present case. In such a case the joint creditors are allowed to prove and receive dividends against the separate estate, in concurrence with the separate creditors. Story on Partnership, sec. 372. Eden on Bankruptcy, 172. But to bring the case within the exception, there must be absolutely no joint estate. If there be any, however small, the exception is not allowed, and it has been rejected where the joint estate amounted only to £1, 11s. 6d. And again, there must be no living solvent partner—and solvent is here used not in its ordinary sense, that is, an ability to pay the whole of one's debts — but in the sense of nonbankrupt partner. For though he may be in fact insolvent and unable to pay the whole of his debts, if he be not actually in legal bankruptcy the excep-

tion is excluded and the general rule prevails. *Ex parte Jansen*, 3 Maddocks 229. The principle is, that while there is any fund, however small, to which the joint creditors may resort, they cannot come against the separate estate in competition with the separate creditors; and though a person may be insolvent, if he be not in actual bankruptcy, and thus divested of all his property, he may still have the ability to pay part of his debts, and this possibility is held to be enough to exclude the joint creditors from sharing in the separate estate of the bankrupt partner, except in the surplus after the separate creditors are paid.

Such is the general rule under the English bankrupt laws, and such the character of the exception to the rule, which it is supposed may be admitted under our law. Our statute has adopted the general rule, without taking notice of any of the exceptions. It does not appear to contemplate the case of there being no joint property, and as it passes it by in silence it may be a grave question whether it does not leave such a case open to the application of the general principles of equity. But as there is a joint fund in the present case, it is immaterial whether it does or not, unless the court may look behind the fact of there being a joint fund, to the manner in which it has been created. It appears from the proofs in the case, or the facts which are admitted, that the assignee rendered in his first account of the partnership estate in October, 1844, in which the whole of the assets, consisting of outstanding demands, are represented as worthless; that afterwards he applied for liberty to compromise or collect a debt, on which he obtained $40, and rendered into court a supplementary account; and it further appears that the money to take up this note was actually advanced by Charles E. Marwick, as creditor of the separate estate. Now the argument is that if the exception to the general rule of marshaling the assets and debts, established under the English bankrupt system, may be admitted under our statute, then, as it is founded on the general principles of equity and distributive justice, a creditor of the separate estate ought not to be permitted to defeat the equity of the joint creditor, by purchasing for a small sum a partnership demand, for which nothing could have been obtained but for this purpose. Allowing the premises on which the argument is founded to be cor-

rect, it does seem to present itself with some force to the equitable consideration of the court. The effect in the present case will be, that the separate creditor will receive nearly the whole of his claim and the joint creditors but a small percentage, if each is restricted to his own appropriate fund.

But after considerable reflection I have come to the conclusion, that, admitting the assumption on which the argument is founded, it cannot prevail. In the first place, if this matter is viewed as a struggle between the two classes of creditors, it is a strife on the part of the separate creditors, not *de lucro captando*, but *de damno vitando*. A creditor may, without any grave imputation in the forum of conscience, be allowed all fair and legal means to avoid a loss, though it may incidentally be at the expense of another creditor. And though it is a maxim in equity jurisprudence that equality is equity, yet the court holds the maxim subordinate to legal priorities, which one party may by his diligence acquire over another. And further, the whole subject of marshaling the assets and claims between the joint and separate creditors in bankruptcy involves some of the most difficult problems that occur in the whole range of jurisprudence. It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. Eden on Bankruptcy, 169, 174. Story on Partnership, secs. 374, 382.

This system is admitted to be not entirely satisfactory; it has sometimes been departed from and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute, which is not found to be encountered by equal difficulties. *Dutton vs. Morrison*, 17 Vesey 193. *Ex parte Elton*, 3 Vesey 238.

If, then, we admit that the equitable doctrines of the English courts, in the administration of their bankrupt law, are applicable under our statute, how will the case stand? In the first place, if this fund had been brought into court in consequence of the purchase of this note by any other person than a separate creditor, it is clear there would have been an end of the case. What difference does it make that he has advanced the money, and thus created the fund? It was the duty of the assignee to make the most of the assets. If, with the knowledge that $40 could be obtained by the transfer of this note, he had rendered it into court as worthless, he might have been compelled to pay the money out of his own pocket. The fund would then have been produced in this way, and the joint creditor would have been in the same condition he is now. It was not for the assignee to inquire who the purchaser was, or what were his motives in making the purchase. And even suppose that he might have done this and refused to sell to a separate creditor for such a purpose, the creditor might have gone to the debtor and furnished him the money to take up the note, and thus indirectly obtain the same result. And indeed this seems to have been the course adopted in the present case; for the note was nominally taken up by one of the company, who was liable upon it, though the money was advanced by the creditor. So that if we were to adopt the principle of going behind the fact of there being a fund, to inquire whether that had not been inequitably created by the management of the separate creditors, the court would at once be involved in inextricable difficulties.

The object of this inquiry is to reach the supposed equity of the case, by making a more just and equal distribution of the assets between the different classes of creditors, and to prevent the separate creditors from creating out of worthless assets a small fund for the sole purpose of preventing the joint creditors from sharing with them the separate assets. But after all, is not this supposed equity more apparent than real? Each class of creditors originally trusted to different funds and different responsibilities, one to the social and one to the separate responsibility. The general equity would therefore seem in all cases to confine each class of creditors to that fund which they primarily trusted, unless in a case where there had been a fraudulent or improper abstraction from one estate for the purpose of in-

creasing the other. And this is the general rule, not only in bankruptcy, but in general equity. Each class of creditors has a right of prior payment out of the estate to which he is supposed to have given credit, and the other class can only go against the surplus. If a creditor of one partner attaches partnership property, his attachment only holds the right or interest which the parties shall be found to have in the property after an account is taken and the joint creditors are paid. Kent's Com. 64–5, Note c, 5th edition. Story's Partnership, sec. 363. The equity of each class of creditors against their proper fund, certainly seems to be stronger than that of the other class who never could have looked to it for their security, except so far as there might be a surplus after discharging its own proper liabilities.

The general rule, therefore, has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a *casus omissus*, not contemplated and therefore not within the purveiw of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes, that when the statute covers the whole case in all its circumstances and make no exceptions, none can be made by the court.

My opinion, on the whole, is that the proof cannot be admitted against the separate estate, in competition with the separate creditors.

NOTE.—See Meclem's Elements of Partn., § 295.

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## MEECH vs. ALLEN.

*Court of Appeals of New York, 1858.*

17 N. Y. 300, 72 Am. Dec. 465.

Appeal from a judgment sustaining a demurrer to a complaint seeking to establish a prior judgment lien. The judg-

ment for which plaintiffs claimed priority was recovered in 1847 against E. P. Taylor, upon his individual debt. The judgment for which defendants claimed priority was recovered in 1842 against Taylor individually and as surviving partner, and was founded upon an indebtedness of his late firm. Both judgments were docketed in Erie county, wherein Taylor owned real property in his individual right. In 1850 executions on both judgments were issued to the sheriff of Erie county, and he proceeded to make sale of this real property. At the sale the plaintiffs gave notice of their claim that their judgment, by reason of its being founded on Taylor's individual debt, and being therefore a lien on his individual property, had a preference, so far as the property offered for sale was concerned, over the other though earlier judgment founded on a partnership debt. Taylor owned no other individual property available to plaintiffs, but there was partnership property available to the other judgment creditors. The sheriff refused to recognize this claim, and sold the property to the defendant. The plaintiffs then brought this suit to establish the priority claimed by them; but the supreme court sustained defendant's demurrer to the complaint.

*S. G. Haven*, for the appellants.

*C. Tucker*, for the respondent.

SELDEN, J. It is a settled rule of equity that as between the joint and separate creditors of partners the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts; and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class, until all the claims of the latter are satisfied. This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside, or in any way interfering with, an absolute right of priority obtained at law. In regard to all such cases the rule is, *Equitas sequitur legem*, 1 Story's Eq. Jur., § 553.

In *Wilder vs. Keeler*, 3 Paige (N. Y.) 171, 23 Am. Dec. 781, Chancellor WALWORTH says: "Equitable rules are adopted by this court in the administration of legal assets, except so far as the law has given an absolute preference to one class of cred-

itors over another." So in the case of *Averill vs. Loucks*, 6 Barb. (N. Y.) 470, PAIGE, P. J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities." This is also conceded in the case of *McCulloh vs. Dashiell*, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271, where the whole doctrine of the distribution in equity of the joint and separate property of partners is very elaborately examined. ARCHER, J., by whom the opinion of the court was delivered, there says: "At law the joint creditors may pursue both the joint and separate estate to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several, without the possibility of the interposition of any restraining power of a court of equity." But especially must it be beyond the power of such courts to interfere, where an absolute right of legal priority is given by force of a positive statute, as in case of a judgment. Chancellor WALWORTH, in *Mower vs. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748, says: "The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it can be enforced by execution at law."

As there is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner, it is obvious, from the preceding authorities, that the theory upon which the complaint in this case was drawn is erroneous. The principle that the separate property of an individual partner is to be first applied to the payment of his separate debts has, as we have seen, never been held to give priority, as to such property, to a subsequent judgment for an individual over a prior judgment for a partnership debt. It is true that courts of equity will sometimes give to a mere equitable lien, which is prior in point of time, a preference over a subsequent judgment; but this will be done only where such prior lien is specific in its character, as in the case of *White vs. Carpenter*, 2 Paige (N. Y.) 219. The mere general equity of the separate creditors to have their debts first paid out of the individual property of the partners does not amount to a lien at all, much less a lien of the kind necessary to give it a preference over a judgment for a partnership debt.

The plaintiffs cannot, under the averments in the complaint, avail themselves of that principle of equity which enables a creditor having a lien upon one fund only to compel a creditor who has a lien not merely on the same fund, but also upon another, to resort first to the latter, to the end that both may be paid. If the complaint had averred that there was sufficient partnership property, upon which the defendant's judgment was a lien, to satisfy such judgment, it is possible that, under the principle referred to, the plaintiffs might have been entitled to some relief; and in that event it would not have been a valid objection to the complaint that it did not ask for the relief appropriate to the case. But the averment in the complaint is simply that there is sufficient estate of the deceased partner, Hiram Pratt, to satisfy the defendant's judgment.

This averment brings the case directly within the doctrine laid down by Lord ELDON in *Ex parte Kendall*, 17 Ves. 520. He says: "If A has a right to go upon two funds, and B upon one, having both the same debtor, A shall take payment from that fund to which he can resort exclusively, that by those means of distribution both may be paid. That takes place where both are creditors of the same person, and have demands against funds the property of the same person. But it was never said that if I have a demand against A and B, a creditor of B shall compel me to go against A without more, as if B himself could insist that A ought to pay in the first instance as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all obligations arising out of these complicated relations may be satisfied. But if I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded in some equity, giving to B the right for his own sake to compel me to seek payment from A."

The point has also been expressly decided in this state in the case of *Dorr vs. Shaw*, 4 Johns. (N. Y.) Ch. 17. The only difference in principle between that case and this is that there it did not appear that the joint debtors were partners. This, however, is a difference which operates against the claim of the plaintiffs here. Where two individuals, not partners, are jointly indebted, it might seem to be just to presume that each owed one-half of the debt, and to that extent, therefore,

there might be an equity in favor of the one owing an individual debt to have so much of the joint debt paid by his codebtor. But in regard to partners, it is now well settled, upon an analogous question, that no such presumption can be indulged. Formerly a judgment creditor of one of two partners might levy his execution upon property belonging to the firm, and upon the presumption that the interests of the partners were equal, might proceed to sell and appropriate one-half of the avails to the satisfaction of his debt. This, however, was long since overruled.

In the case of *Dutton vs. Morrison*, 17 Ves. 193, Lord ELDON, in discussing this question, says: "It may be represented that the world cannot know what is the distinct interest of each (*i. e.*, each partner), and therefore it is better that the apparent interest of each should be considered as his actual interest. But courts of equity have long held otherwise." He then lays down the rule ever since acted upon, that the creditor in such a case must wait until the partnership accounts are settled before he can claim anything from the partnership property.

The principle here asserted by Lord ELDON is directly applicable to the present case. It is, that no inference can be safely drawn from the mere external relations of partners to the world as to the situation of their affairs *inter se*, and that in all judicial proceedings involving the latter an investigation is first to be made; and such is the variety and frequent complexity of partnership dealings that any other rule would obviously lead to gross injustice. It is impossible, therefore, in this case to assume, without any averments on the subject in the complaint, that the estate of the deceased partner Pratt ought, in equity, to pay any portion of the defendant's judgment. Hence, upon the principles laid down by Lord ELDON, and universally acted upon by courts of equity, the complaint is clearly insufficient.

The judgment of the supreme court, therefore, should be affirmed, with costs.

All the judges concurred.

Judgment affirmed.

NOTE. See Mechem's Elem. of Partn., § 308.

## KELLY vs. SCOTT, *et al.*

*Court of Appeals of New York, 1872.*

49 N. Y. 595.

Appeals from judgments of the General Term of the Supreme Court in the first judicial department, affirming judgments entered in favor of defendants upon the reports of a referee.

These actions were brought by plaintiff, as sheriff of the city and county of New York, to reach the avails of certain property alleged to belong to the firm of John E. Shawhan & Co., which plaintiff claimed under and by virtue of attachments against said firm in suits brought against it by firm creditors.

On the first of July, 1867, John E. Shawhan, C. Mendall and A. H. Palmer, of St. Louis, Missouri, advertised themselves as copartners, under the firm name of John E. Shawhan & Co., and they continued business in St. Louis ostensibly under that name until October, 1867. In reality, Mendall and Palmer were not partners, but merely clerks in the employ of Shawhan, receiving salaries as such. The latter owned all the property. This secret arrangement was unknown to the creditors of the nominal firm.

Shawhan failed in October, 1867; instituted proceedings in bankruptcy, and was adjudged a bankrupt in the district court of the United States for the eastern district of Missouri. The defendants were appointed his assignees. At the time of the failure, certain agents in New York, of the nominal firm, had in their hands the avails of property shipped to them to sell on commission. The proceeds of this sale were included by Shawhan in the schedule of assets filed in his proceedings in bankruptcy. Certain of the firm creditors thereupon commenced suits by attachment against the members of the firm, which writs of attachment were placed in plaintiff's hands for execution, and by virtue thereof he attached the moneys arising from the sales in the hands of the agents, and after the obtaining of judgments, these actions were brought against the agents to compel the payment of the funds in their hands as aforesaid. By orders

of interpleader in the actions, the present defendants, the assignees in bankruptcy, were substituted as defendants, and the moneys were paid into the United States Trust Company to abide the judgment.

The referee found, in substance, that Shawhan, when he became bankrupt, was the sole owner of the funds in controversy, and that the same passed, by the assignment in bankruptcy, to his assignees, and the subsequent levies by plaintiff were inoperative and void, and he thereupon directed judgments in favor of defendants, which were accordingly entered.

*John C. Dimmick* for the appellant.

*Benjamin Odell* for the respondents.

CHURCH, C. J. This case presents a somewhat novel phase to the disputed and much litigated questions growing out of the respective rights of individual and partnership creditors to partnership property, and the remedy for enforcing such rights. As between themselves, Mendall and Palmer, were nominal partners merely, Shawhan having the entire interest in the property and in the profits of the business.

There is no dispute that Mendall and Palmer by holding themselves out as partners were personally liable for the debts of the firm, although they in fact had no interest in it. (Story on Partn., sec. 64.) But there is no question of personal liability in the case. The firm failed and Shawhan went into bankruptcy, and this is a contest between his assignees in bankruptcy to property nominally held by the firm, but really belonging to Shawhan by virtue of the original arrangement between him and Mendall and Palmer by which they were to be nominal partners and an attaching creditor of the firm. I fully concur with the legal propositions in the opinion of the learned referee, and if they are decisive of the case the judgments must be affirmed. According to the authorities upon the subject as they now exist, each partner by virtue of his community of interest, in case of insolvency or dissolution of the firm, has a lien upon the partnership effects for the discharge of all the partnership debts, and this equity may be made available for the benefit of creditors to secure a preference in the payment of partnership debts. It is said that although the creditors have no lien they have "something

approaching to a lien" of which they may avail themselves to secure an equitable preference. (Story on Partnership, sec. 360.) And an attachment or execution for a partnership debt will take precedence over process on an individual debt by virtue of this *quasi* lien derived through and dependent upon the lien of each partner upon partnership effects to have the partnership debts paid. (Id., 361, and cases cited.) It is a part of the same theory that this equitable lien of each partner is for his benefit only, and that by a transfer *bona fide* of his interest in the partnership effects to his copartner, the lien or equity is gone and the creditors can derive no rights through or by reason of it. In other words, the creditor's right is derivative only, and if by any valid arrangement or agreement the partner deprives himself of it, the creditors can derive none through him. It has accordingly been held, that if one of two partners transfers in good faith to the other all his interest in the partnership effects, and in consideration of the payment of partnership debts, his equity or lien to have the partnership debts paid is gone, and he has only the personal security of his copartner, and that the latter becomes the absolute owner of the property, which is equally subject to individual as to partnership debts, and the partnership creditors lose their derivative right of lien by the transfer of the partner through whom alone they could derive it. (32 N. Y. 65; 8 Barb. 593.) This theory, it must be confessed, seems artificial and indefinite, but it has been generally adopted by the courts, and is a modification in favor of partnership creditors of the old notion of a tenancy in common.

Mr. Parsons, in his work on Partnership (p. 355), in an able review of the general subject, has suggested a further modification in the same direction assimilating partnerships more nearly to corporations, and it is not improbable that the growing importance of the relation may induce the adoption of some change by which the rights and equities of partnership creditors shall be more certain, and independent of the action of the partners themselves. Mendall and Palmer never had this equitable lien, because by the original arrangement between them and Shawhan he was the absolute owner of the property with power of disposition. Their legal position was that of surety for Shawhan, without any of the rights of a partner, and having no such rights, they could transmit none to creditors. It would follow

that the property in the hands of Shawhan was individual property and passed to his assignees. Upon this ground the referee found for the defendants, and found correctly, if the facts which actually existed are controlling.

But there is another view of the case which I think deserves attention, and that is, whether Shawhan himself, or his assignees, are in a position to deny to the partnership creditors all the rights which they would have had if Mendall and Palmer had been actual partners. Can he deny that they were partners in fact, not merely to the extent of personal responsibility, but also as possessing the equitable right necessary to enable partnership creditors to secure their just preference? Shawhan advertised to the world that they were partners. The attachment creditor dealt with them as such. Had he not a right to rely not only on their personal responsibility, whatever it was, but upon this equitable security upon the partnership effects; and are we not bound to assume that he did so rely?

It may be said that they could at any time have transferred to Shawhan their whole interest, and thus deprived the partnership creditors of this right. If the transfer had been made in good faith such might have been its effect, and the creditors could not lawfully complain. But this was not done. A transfer in contemplation of bankruptcy, or one made with intent to deprive the creditors of their equitable lien, would have been void. It is only in case of insolvency or dissolution that the lien attaches. While the business continues and the firm is solvent, neither the partners nor creditors have any lien except by the ordinary process of judgment and execution. Nor would an original contract, I apprehend, be allowed to stand against partnership creditors, which provided, in case of bankruptcy, that one of the partners should own the whole property, and thus expose it in advance to individual creditors. (Id. sec. 358.) The question is, what did Shawhan assert by his acts and declarations in respect to Mendall and Palmer, and what had the attaching creditor a right to understand that he asserted? Was it that they were nominal partners merely, or that they had invested him with the absolute title to all property owned or to be purchased? There is not a circumstance in the case to favor such an inference. On the contrary they appeared to be partners possessing the ordinary rights and subject to the usual obligations. It is to be presumed that Shawhan intended the public should so

understand, and that the attaching creditor did so regard them. It may be urged that such an arrangement might lawfully be made, and consequently that all persons dealing with the firm did so with a knowledge of it subject to this right. This is the most plausible view for the defendants, but I do not regard it as conclusive. The point is, in what position did Shawhan place Mendall and Palmer by his acts and declarations? It is not what possible contract they might have made, but from Shawhan's acts how had the public a right to regard them?

I think that the fair and reasonable inference which any business man dealing with the firm would draw from the acts and conduct of Shawhan, would be that he had admitted Mendall and Palmer as partners, with the ordinary rights and subject to the usual obligations incident to that relation. If so, we cannot say that the attaching creditor did not deal with the firm, and give them credit partly on the supposition that he would be entitled to the preference which he is now seeking to enforce. It is not unusual to give a firm credit, when the same credit would be withheld from either of the individuals composing it, because of this known right of preference to partnership effects. If I am right in translating the acts of Shawhan as a deliberate and definite representation that Mendall and Palmer were partners, with the usual rights and obligations, and that the attaching creditor properly so regarded them, and gave the firm credit upon the faith of it, it follows as a necessary legal sequence that he cannot be permitted to deny it to the injury of the creditor upon the principle of an estoppel in *pais*. It is conceded that no right could be derived through the nominal partners, because they possessed none, and whether they claim or renounce all partnership rights is of no consequence. The rights of the attaching creditors must rest upon the legal inability of Shawhan to deny that they possessed the rights requisite to sustain the creditors' claim to this money.

The principle of estoppel is too well understood and too firmly settled to require the citation of authorities. *De Zell vs. Odell*, (3 Hill 215) is a leading authority in this state, but the principle has been repeatedly adjudicated since. The rule is always applied to enforce integrity and fair dealing in the business concerns of life. It prohibits one from denying his declarations to the injury of another who has acted upon the faith of them, and it applies as well to acts and conduct as to declarations.

I think also that the application of the rule to a case like the present is in accordance with public policy, and is calculated to subserve the ends of justice. We cannot, of course, know what the facts of this particular case are, but it is palpable that a contrary rule might in many cases work great fraud and injustice. If secret agreements of an unusual character, creating relations directly at variance with those which are apparent, can deprive partnership creditors of that preference which the law declares just, and expose the property to the individual creditors of one of the partners, gross frauds could be committed not only, but the confidence of the commercial community would be impaired and the business interests of the country suffer. All secret arrangements between partners to the injury of third persons are void.

Shawhan being estopped from denying the rights of the attaching creditor, his assignees are also estopped. They have no other or superior rights to him, and they are vested with the property subject to all equities against it in his hands. (2 Story R., 360, 630; James' Bankrupt Laws, 36; Benedict's U. S. Dist. Court R., 347.) It was admitted upon the argument that if Mendall and Palmer had been in fact partners, the defendants would have had no title. The same results must follow if they are in a position with reference to the property where they cannot deny the partnership. These views lead to a reversal of both judgments.

All concur.

Judgments reversed.

NOTE.—See Mechem's Elements of Partn., § 299.

See *Thayer vs. Humphrey*, 91 Wis., 276, 64 N. W. 1007, 30 L. R. A. 549; also *Van Kleeck vs. McCabe*, 87 Mich. 599, 49 N. W. 872 (reported as *Van Kleeck vs. Hammell* in 24 Am. St. R. 182).

## BROADWAY NATIONAL BANK vs. WOOD, *et al.*

*Supreme Court of Massachusetts, 1896.*

165 Mass. 312, 43 N. E. 100.

Bill in equity against Wood, W. H. Leatherbee, C. W. Leatherbee and Harry F. Faden alleging that plaintiff is the holder of a note signed by Harry F. Faden & Co., and that defendants except Wood were all the partners of Harry F. Faden & Co. That defendants Leatherbee claim to be the only actual partners, but that Faden, when plaintiff took the note, was held out, both by himself and defendants Leatherbee, as a partner in the firm. That the firm, at the time of making the note, at the time when plaintiff discounted the same, and continuously thereafter to the time of the insolvency proceeding hereinafter stated, conducted a lumber business in Waltham and advertised to the public under the name of Harry F. Faden & Co. That during all this time defendants carried on the lumber business in Boston under the name of William H. Leatherbee & Son. That defendants Faden and the Leatherbees represented to the plaintiff when the note was discounted that Faden was a partner in the firm of Harry F. Faden & Co., which was a separate and distinct firm from Wm. H. Leatherbee & Son. That this representation was made to secure credit and that plaintiff relied thereon. That when the note was made and when it was discounted Harry F. Faden & Co., was possessed of large assets which it continued to own without substantial change in value down to the time of the assignments hereinafter stated.

That after the note was discounted and before the same was due defendants Leatherbee, doing business as Wm. H. Leatherbee & Son, made an assignment of all their assets for the benefit of creditors and undertook to include therein all the property theretofore represented as belonging to Harry F. Faden & Co.

That thereafter upon the petition of a creditor of the firm of Wm. H. Leatherbee & Son that firm was adjudged insolvent

and defendant Wood was appointed assignee. That all of the property of Wm. H. Leatherbee & Son, including all the property of Harry F. Faden & Co., was transferred by defendants Leatherbee to Wood, under a compromise agreement, for the benefit of the creditors of Wm. H. Leatherbee & Son. That the property of Harry F. Faden & Co. in the hands of Wood was more than sufficient to pay all the creditors of the firm of Harry F. Faden & Co. That Wood was about to sell the property of Harry F. Faden & Co. for the purpose of distributing the proceeds among the creditors of the firm of Wm. H. Leatherbee & Son in accordance with the compromise agreement and that plaintiff having no adequate remedy at law prayed that Wood might be enjoined therefrom and might be directed to apply said property, or as much as might be necessary, to the payment of plaintiff's claim, or that Wood be directed to render an account of said property, to marshal the same as assets of Harry F. Faden & Co., and to apply them to the payment in full of the creditors of Harry F. Faden & Co. before paying the creditors of Wm. H. Leatherbee & Son any part thereof. Defendants demurred; demurrer was sustained and plaintiff appealed.

*R. T. Babson*, (*G. L. Mayberry* with him) for the plaintiff.

*H. W. Chaplin*, for the defendants.

ALLEN, J. On the averments of the bill, it must be assumed that Faden was an ostensible but not an actual partner, and that the property which the plaintiff seeks to reach and apply to the payment of its debt was in fact owned by the two Leatherbees. Assuming that Faden was and is personally liable to the plaintiff as ostensible partner, on the ground of estoppel, it is contended that this has the effect to entitle the plaintiff as a creditor of the ostensible firm to have the property which was in the possession and use of that firm applied to the satisfaction of the creditors of that ostensible firm in priority to creditors whose claims are only against the two Leatherbees. There are some decisions which support or favor this view. *Kelly vs. Scott*, 49 N. Y. 595. *Hillman vs. Moore*, 3 Tenn. Ch. 454. *Whitworth vs. Patterson*, 6 Lea (Tenn.) 119. But the weight of authority and the better reason, as we think, are

the other way. The estoppel is a personal one. An ostensible partner cannot be included in insolvency proceedings instituted by the actual partners. *Hanson vs. Paige*, 3 Gray 239. He cannot interfere in the management of the partnership business, and obtain an injunction or a receiver. *Nutting vs. Colt*, 3 Halst. Eq. 539. *Kerr vs. Potter*, 6 Gill 404. He has no lien on the partnership assets. *Stone vs. Manning*, 3 Ill. 530.

The long established equity of joint creditors to be paid in piority out of the joint funds is usually said to be by way of substitution to the rights of the partners *inter sese*, and where no such right exists then the creditors have no such equity. This doctrine is so firmly established that it is too late now to question it. Story, Eq. Jur. 675, 1253. *Howe vs. Lawrence*, 9 Cush. 553, 558, 559. *Harmon vs. Clark*, 13 Gray 114, 121. *Robb vs. Mudge*,14 Gray 534, 539. *Case vs. Beauregard*, 99 U. S. 119, 125. *Fitzpatrick vs. Flannagan*, 106 U. S. 648, 654. *Huiskamp vs. Moline Wagon Co.*, 121 U. S. 310, 323. *Saunders vs. Reilly*, 105 N. Y. 12, 19, 20. *Brown vs. Beecher*, 120 Penn. St. 590, 607, 608. *Washburn vs. Bank of Bellows Falls*, 19 Vt. 278. *Rice vs. Barnard*, 20 Vt. 479. *Couchman vs. Maupin*, 78 Ky. 33. *Farley vs. Moog*, 79 Ala. 148. *Golden State & Miner's Iron Works vs. Davidson*, 73 Cal. 389, 392. *Grabenheimer vs. Rindskoff*, 64 Tex. 49. It has also been held in England that, when trustees who are authorized to carry on business contract debts, their creditors can only resort to the trust fund when the trustees are entitled to be indemnified therefrom, and that the creditors reach it only by being substituted to the equities of the trustees. See *In re Johnson*, 15 Ch. D. 548, and *Dowse vs. Gorton*, 40 Ch. D. 536, cited in *Mason vs. Pomeroy*, 151 Mass. 164, 167.

In applying the foregoing doctrine to cases where a person is ostensibly, but not actually, a member of a partnership, and is therefore under a personal estoppel to deny his liability, it follows that a creditor who by reason of this estoppel can maina personal action against him cannot extend this estoppel so as to bind the property which was in the possession and use of the actual partners. The ostensible partner himself has no equity to have this property applied to the payment of the claims upon which he is liable; and therefore the creditors holding those claims, who are merely subrogated to his rights and equities,

have no such equity. *Kerr vs. Potter*, 6 Gill 404. *Glenn vs. Gill*, 2 Md. 1. *Reese vs. Bradford*, 13 Ala. 837, 846. Scull's Appeal, 115 Penn. St. 141. York County Bank's Appeal, 32 Penn. St. 446. *Swann vs. Sanborn*, 4 Woods C. C. 625.

The result is, that the decree sustaining the demurrer and dismissing the bill was right.

Decree affirmed.

NOTE.—See Mechem's Elements of Partn., § 299.

# XVI.

# DISTRIBUTION OF ASSETS BETWEEN PARTNERS.

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## WHITCOMB vs. CONVERSE.

*Supreme Court of Massachusetts, 1875.*

119 Mass. 38, 20 Am. Rep. 311.

Bill in equity by Whitcomb, a partner in the late firm of Converse, Whitcomb & Co., against Converse, Stanton and Bladgen, the other partners, to compel contribution to make good the losses of the firm. The firm was organized January 2, 1871, to continue one year under articles which provided that Converse was to contribute $25,000, receive 7% thereon, give such time to the business as he was able, and receive one-fourth of the net profits; Whitcomb was to contribute $50,000, have 7% interest, give all his time and take one-fourth of the net profits; Blagden and Stanton were each to contribute all his time and receive one-fourth of the net profits. Whitcomb put in $25,000 of the agreed $50,000. The partnership was dissolved by mutual consent March 9, 1871, and Whitcomb was authorized to close up the business. He did so and claimed a loss to the firm was shown of $25,000, for which he claims contribution. Blagden is insolvent and unable to pay any part of the loss. Stanton brought the bulk of the business to the firm, and he contended that he was not liable to make good any of the losses, and, if liable, was not liable to make good any of the amount which Blagden ought to make good. Cause reserved for opinion of supreme court.

*C. T. Russell*, for plaintiff.

*G. O. Shattuck* and *O. W. Holmes, Jr.*, for Stanton.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services: 3 Kent's Com. 28, 29. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story on Partn. §§ 27, 29; *Heron vs. Hall*, 1 B. Monr. (Ky.) 159, 35 Am. Dec. 178.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest, but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. *Julio vs. Ingalls*, 1 Allen (Mass.) 41; *Bradbury vs. Smith*, 21 Me. 117; *Barfield vs. Loughborough*, L. R. 8 Ch. 1; *In re Anglesea Colliery Co.*, L. R. 2 Eq. 379, 387, s. c. L. R. 1 Ch. Ap. 555; *Nowell vs. Nowell*, L. R. 7 Eq. 538; *In re Hodges Distillery Co.*, L. R. 6 Ch. Ap. 51; 1 Lindley on Partn. (3 Ed.) 696, 827, 828.

Only two cases were cited in the learned argument for the defendant Stanton, in which opinions inconsistent with this view have been expressed. The one is *Everly vs. Durborow*, 1 Leg. Gaz. Rep. 127, a *nisi prius* decision, with no reference to authorities except an early edition of Lindley on Partnership, which has been corrected by the learned author, *ubi supra*, conformably to the adjudged cases. The other is *Cameron vs. Watson*, 10 Rich. (S. Car.) Eq. 64. That was a bill in equity to

settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The master, to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon; pp. 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exception of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution, pp. 80-90, 95, 96. The court of appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular, pp. 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital in unequal proportions. Converse was to contribute "such time as he may be able to give"; and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by the express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one-fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. *Whitman vs. Porter*, 107 Mass. 522; 1 Lindley on Partn. 789, 790.

Decree for the plaintiff accordingly.

NOTE: See Mechem's Elem. of Partn., §§ 305, 308.
Compare with the following case.

## SHEA vs. DONAHUE.

*Supreme Court of Tennessee, 1885.*

**15 Lea, 160, 54 Am. Rep. 407.**

**Bill for partnership accounting between Shea and Donahue. They became partners under written agreement for one year "as merchants in making, buying and selling all kinds of tinware, stoves, pumps, etc." "And to constitute a fund for the purpose Timothy Shea has paid in as stock one thousand dollars, which will constitute a common stock, to be used and employed between us in buying goods, wares and merchandise. John Donahue being a practical workman and having considerable experience in the above named business, it is agreed that he will give the business his entire personal attention and the benefit of his experience, to place against the cash furnished by said Shea. We are to bear the expenses and losses jointly and share the profits equally. The capital stock is not to be withdrawn by either party until the end of the term, but to be employed as capital unless otherwise mutually agreed between us in writing." The business was in fact carried on for about three years. Upon the settlement, Donahue claimed to be entitled to one-half of the capital advanced by Shea. The chancellor decided against Donahue, and he appealed.**

***J. W. Green*, for complainant.**

***H. H. Taylor*, for defendant.**

COOPER, J. (After stating the facts.) **The contention of the defendant is, that by the terms of the agreement he was entitled at the end of one year to an equal share of the profits of the business, and to one-half of the capital advanced by his partner, and this, although it goes without saying he would retain all his practical experience which was to be placed against the cash furnished by his partner. But the agreement is that the partners are only to "share the profits equally," not the profits and the capital. And the profits of any business are only what remains after deducting debts and expenses, and the capital paid in. Lindley on Partn. 791, 806. The provision that**

the capital stock shall constitute a common stock to be used in buying the materials and wares of their trade, merely designates the mode in which it is agreed that the capital shall be invested. And the further provision that the capital stock shall not be withdrawn by either party until the end of the term, was only intended to restrain the partners from drawing funds from the business so as to trench upon the capital while the partnership continued. There is nothing in the article of agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals.

Of course the articles of a partnership may expressly provide for an equal division of the assets, upon a dissolution, notwithstanding an unequal advance of capital by the respective partners. The same result may follow a continuous course of dealing upon a basis which implies such equal division. For if there is no evidence from which any different conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal, upon the favorite maxim of chancery, that equality is equity. But, as Mr. Lindley tells us, the rule is when the partners have advanced unequal capitals, and have agreed to share profits and losses equally, without more, that each partner is entitled to his advance before division, and a deficiency in the capital must be treated like any other loss, and borne equally by the partners. Lindley Partn. 807.

The only authorities adduced by the learned counsel of the defendant, in support of his contention in this case, are to the effect that property brought into the partnership business by the members of the firm, or bought with capital advanced, becomes partnership property, and may be disposed of as such by one of the partners under his general powers as a member of the firm. And so it does beyond all question, for the very object of contributing capital, either in property or money, is to secure a partnership stock for the purpose of carrying on the common business. But this fact has nothing to do with the settlement between the partners of their accounts at the end of the partnership. "By the capital of a partnership," says Mr. Lindley, "is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business. The capital of a partnership is not therefore the same as its property; the capital is a sum fixed by the agreements of the partners, whilst the actual assets of the

firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital, *e. g.*, for money loaned. The amount of each partner's capital ought therefore always to be accurately stated, in order to avoid disputes upon a final adjustment of accounts; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal." Lindley Partn. 610. [1 Ewell's Lindley, 2d Am. Ed. 320.] The same author adds in another place: "When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is that the losses of capital, like other losses, must be shared equally, but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund which ought to be divided between the partners in equal shares." Lindley, Partn. 67. On the contrary, in his chapter devoted to partnership accounts [2 Lindley, Partn. 2d Am. Ed. 402], he expressly tells us that the assets of a partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.

"3. In paying to each partner ratably what is due from the firm to him in respect of capital.

"4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown."

In accordance with these principles, the following decision has been made by the supreme court of New York in a case cited in a note to page 610 of Lindley on Partnership: "Where by the terms of the agreement the defendant furnished the capital stock, and the plaintiff contributed his skill and services, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock on a settlement of the affairs of the partnership. He has no interest

in any part of the capital excepting so far as in the progress of the business the same may have been converted into profits." *Conroy vs. Campbell*, 13 Jones & Sp. 326. The case, it will be noticed, is exactly in point. And to the same effect in principle are *Whitcomb vs. Converse*, 119 Mass. 38, 20 Am. Rep. 311, *ante; Knight vs. Ogden*, 2 Tenn. Ch. 473, and *Shepherd, Ex parte*, 3 Tenn. Ch. 189. No case has been found to the contrary.

Chancellor's decree affirmed.

NOTE: See Mechem's Elem. of Partn., §§ 305-308.

# XVII.

# LIMITED PARTNERSHIPS.

## CHICK vs. ROBINSON, *et al.*

*Circuit Court of Appeals, 1899.*

95 Fed. Rep. 619, 37 C. C. A. 205.

In error to the circuit court of the United States for the eastern district of Michigan.

This is a writ of error to a judgment in favor of the defendant A. W. Comstock in a suit brought by Swain T. Chick and William T. Chick, copartners as Chick Bros., citizens of Massachusetts, against Henry S. Robinson, Richard G. Elliott, and Andrew W. Comstock, copartners as H. S. Robinson & Co., on a note of the firm for $2,166.70. A verdict and judgment were entered against Henry S. Robinson and Richard G. Elliott without controversy. Andrew W. Comstock defended against the note on the ground that he was a special partner, under the statutes of Michigan, and was not liable on the note. The sections of the statutes of Michigan providing for limited partnership will be found in Howell's Annotated Statutes, as follows:

"SEC. 2342. Limited partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute a specific amount of capital, in cash or other property, at cash value, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the amount of the fund so contributed by them respectively to the capital, except as hereinafter provided."

"SEC. 2344. The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain: (1) The name or firm under which the partnership business is to be conducted. (2) The general nature of the business to be transacted. (3) The names of all the general and special partners interested therein, distinguishing which are general partners and which are special partners, and

their respective places of residence. (4) The amount of capital stock which each special partner shall have contributed to the common stock. (5) The period at which the partnership is to commence, and the period when it will terminate.

"SEC. 2345. Such certificate shall be acknowledged by the several persons signing the same, before some officer authorized by law to take the acknowledgment of deeds, and such acknowledgment shall be made and certified in the manner provided by law for the acknowledgment of deeds for the conveyance of lands.

"SEC. 2346. The certificate so acknowledged and certified shall be filed in the office of the county clerk of the county in which the principal place of business of the partnership shall be situated, and shall be recorded at length by the clerk in a book to be kept by him; and such book shall be subject, at all reasonable hours, to the inspection of all persons."

"SEC. 2348. At the time of filing the original certificate and the acknowledgment thereof, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the amount in money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually and in good faith contributed and applied to the same.

"SEC. 2349. No such partnership shall be deemed to have been formed, until such certificate, acknowledgment and affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners."

"SEC. 2354. The business of the partnership shall be carried on under a firm in which the name of one or more of the general partners only shall be inserted, with or without the addition of the words 'and company,' or any other general term; and if the name of any special partner shall be used in said firm with his consent or privity, or if he shall personally make any contract respecting the concerns of the partnership, with any person except the general partner, he shall be deemed and treated as a general partner.

"SEC. 2355. During the continuance of the partnership under the provisions of this chapter, no part of the capital stock thereof shall be withdrawn, nor any division of interest or profits be made, so as to reduce said capital stock below the sum stated in the certificate above mentioned; and if, at any time during the continuance, or at the termination of the partnership, the property or assets shall not be sufficient to pay the partnership debts, then the special partners shall severally be held responsible for all sums by them received, withdrawn or divided, with interest thereon from the time when they were so withdrawn or divided respectively.'

"SEC. 2364. A special partner may from time to time examine into the state and progress of the partnership concerns, and may advise as to their management; he may also loan money to, and advance and pay money for the partnership, and may take and hold the notes, drafts, acceptances, and bonds of or belonging to the partnership, as security for the repayment of such moneys and interest, and may use and lend his name and credit as security for the partnership, in any business thereof, and shall have the

same rights and remedies in these respects as any other creditors might have.

It appears by the evidence that Henry S. Robinson and Richard G. Elliott, as general partners, and Andrew W. Comstock, as special partner, entered into a partnership agreement; that the certificate was duly signed and acknowledged, stating the facts required in section 2344, and, among them, that Andrew W. Comstock as special partner had contributed $50,000 to the common stock. Henry S. Robinson, one of the general partners, in accordance with section 2348, made an affidavit on the 1st of May in which he stated "that the amount stated in said certificate to have been contributed to said limited partnership by said Andrew W. Comstock has been actually contributed by him and has been received by said limited partnership, and applied to the assets thereof." The certificate and affidavit were filed on the 2d of May. The plaintiffs contended that Comstock was liable as a general partner, for two reasons: (1) Because the statement in the affidavit was false, in that at the time of filing the certificate the amount in cash specified in the certificate to have been contributed by Comstock, the special partner, to the common stock had not been actually and in good faith contributed and applied to the same. (2) Because Comstock, the special partner, had personally made contracts for the firm, and thus rendered himself generally liable as partner, under the statute. At the close of the evidence the court submitted both issues to the jury, but before a verdict was returned the trial judge withdrew the first issue from their consideration, instructing them that there was no evidence that the amount of $50,000 was not contributed in good faith in cash by Comstock as early as May 2d, as certified in the affidavit. Upon the second issue the jury found for the defendant.

*Harrison Geer* and *F. W. Whiting*, for plaintiffs.

*Michael Brennan* and *Henry A. Haigh*, for defendants.

Before TAFT and LURTON, Circuit Judges, and THOMPSON, District Judge.

TAFT, Circuit Judge. The main controversy in this court is whether there was any evidence which should have been submitted to the jury tending to show that Comstock did not, as certified in the affidavit of Robinson, actually in good faith con-

tribute in cash the $50,000 to the stock of the company on the 2d day of May, 1893. The affidavit was dated the 1st of May but it seems to be conceded by the counsel for plaintiff in error that if the money was contributed before the affidavit was filed this is a sufficient compliance with the statute. The concession is justified by the decision of the court of appeals of New York in *White vs. Eiseman*, 134 N. Y. 101, 31 N. E. 276. See, also, *Ropes vs. Colgate*, 17 Abb. N. C. 136.

The plaintiff produced the books of the partnership, which show that on May 1st Comstock was credited by capital stock with the payment of $30,000, on May 24th with the payment of $10,155, and on June 3d with $9,845, making a total of $50,000 On August 1st he is credited by interest with $657, and was paid that amount. The interest thus credited and paid to him is at the rate of 6 per cent. on $30,000 from May 3, 1893, on $10,155 from May 4, 1893, and on $9,845 from June 3, 1893, all down to August 1st. This evidence taken from the books was objected to on behalf of defendant Comstock. He testified that he had never seen the entries in which the credits for his special capital were entered before coming into the court room, and that he did not begin to look into the books until two years after the firm was organized. By section 2364 a special partner is given the power "from time to time to examine into the state and progress of the partnership concerns, and may advise as to their management." It seems to us that entries in the partnership books which are open to his inspection, and with respect to which he may advise, are at least *prima facie* evidence against him of transactions of the firm. It has been so held under a similar statute of New York. *Bank vs. Huber*, 75 Hun 80, 26 N. Y. Supp. 961; *Kohler vs. Lindenmeyr*, 129 N. Y. 498, 29 N. E. 957; *Hotopp vs. Huber* (Sup.) 41 N. Y. Supp. 991.

Elliott, one of the partners, testified that Comstock contributed $50,000 in checks, $30,000 of which were deposited to the credit of the firm, and paid on the 2d day of May. Two of the checks were not deposited or collected on the 2d of May. A check for $10,155 was collected on the 24th of May, and the remaining check, for $9,845, was deposited and collected on the 3d of June. Elliott testified there was no agreement, so far as he knew, that these checks were to be held, but that they did not deposit them because they did not need the money. Rob-

inson testified that everything was contributed, in what he considered cash items, on the 1st day of May. He said there was no due-bill of Comstock, but he had an indefinite impression that in the payments there was a note of Farrand, Williams & Clark for $10,155. Elliott and Robinson were called by the plaintiffs. It further appeared that a note of Farrand, Williams & Clark for $10,155, due to Comstock, was paid on May 24th at the Commercial National Bank, where it had been deposited by Comstock for collection, and that the note had been sold by the Commercial Bank to the Alpena Banking Company, Comstock's bank, and that when the note fell due the assistant cashier of the Commercial National Bank paid Comstock by giving his check for that amount to H. S. Robinson & Co.

Comstock testified in his own behalf. His statement was that he gave $50,000 in checks, $30,000 of which were collected on the 2d of May. He testified that he had a note of Farrand, Williams & Clark for $10,155, which he brought down with him from Alpena, where he lived, intending to put it in as part of his contribution, together with a certified check on the Alpena Banking Company, of which he was president and part owner, for $9,845; that when he examined the affidavit and found the statement therein that the contribution had been made in cash, he did not use the note, but another check on the Alpena Banking Company for $10,155, and certified it as president of that banking company. He testified that there was no agreement by which his certified checks aggregating $20,000 should be held, but that when he found on the 24th of May that his check for $10,155 had not been deposited and collected, he concluded that it would save trouble to take up his check, and use the money collected on the Farrand note for that purpose. This he did. He says he objected seriously to the failure to credit him with interest on $50,000 from May 1st, when he delivered all the checks, that he called the attention of Robinson to the injustice, and that the failure to rectify the error was due to the financial difficulties of the firm which so soon followed.

It appears clearly without contradiction, that the checks were good upon the day upon which they were delivered to H. S. Robinson, and would have been paid, had they been presented, on that day. The question is whether the circumstances that they were not presented until the 24th of May and the 3d of June,

that the payment of the 24th of May was made at the time when the Farrand, Williams & Clark note was paid, and that interest was not charged in favor of Comstock on the books of the company on the $20,000 until the 24th of May and the 3d of June, do not tend to justify an inference of fact contrary to the positive statement of Robinson, Elliott and Comstock, that there was no agreement to hold the checks until the 24th of May and 3d of June. If there had been such an agreement to hold the checks their use by Robinson would clearly not have been an actual contribution in good faith in cash as of May 2d. In the absence of such agreement, Comstock was entitled to interest on $50,000 from May 1st, because he could not be charged with the delay in collection, as between the partners. The question is a close one, but we think that in view of the positive statement of Robinson and Elliott, called by the plaintiff, and of Comstock, called in his own interest, that no such agreement existed, in view of the uncontradicted explanation by Comstock as to the mode in which the entries happened to be made, in view of the uncontradicted statements by Elliot that the checks were deposited when they were needed, the inferences to be drawn from the book entries and the charge of interest create only a scintilla of evidence supporting the view that there was any agreement between the partners as to the withholding of the check. The evidence relied on by the plaintiffs amounts, when carefully and calmly considered, to nothing more than a suspicion that there may have been some agreement between the partners. We do not think it was enough to require the court below to submit the issue raised on the pleadings on this point to the jury.

It is objected that Comstock's checks for $20,000 were not an actual contribution in cash to the assets of the firm, even if there was no agreement by the general partners to withhold presentation, and even if they were good when delivered to the general partners. The early decisions construing limited partnership statutes were very strict, and a literal compliance with the statute was enforced. In some states, notably in Massachusetts, this construction of such a law is still maintained. *Haggerty vs. Foster*, 103 Mass. 17. In others a more reasonable view has been taken of late, and all that is required is a substantial compliance with the provisions of the statute, in good faith. *Manhattan Co. vs. Laimbeer*, 108 N. Y. 578, 15

N. E. 712; *White vs. Eiseman*, 134 N. Y. 101, 31 N. E. 276. This is the rule of construction adopted by the supreme court of Michigan in enforcing the statute. *Hogan vs. Hadzsits*, 113 Mich. 568, 71 N. W. 1092.

Comstock's checks were certified, and it is expressly held by the court of appeals of New York that such instruments are equivalent to cash. *White vs. Eiseman*, 134 N. Y. 101, 31 N. E. 276. But it is said that as the certificate was by Comstock, the president of the Alpena Banking Company, of his own check, the check was not certified in such a way as to bind the company. We shall not enter upon a discussion of this objection, because we are of opinion that a check, though uncertified, if good when delivered and paid when presented, is a contribution, in cash in good faith, although it may not be presented until after the filing of the certificate. If the check is good the general partners may obtain the money upon it at any time. If the drawer is dishonest, and subsequently reduces his bank balance so that the check is dishonored, that is conclusive evidence that the delivery of the check was not payment in cash in good faith, and the penal liability of the special partner accrues. The payment of checks as cash is in accordance with a well-known and reasonable usage of merchants, and we can see no reason why the statutes concerning limited partnerships should not be construed in the light of that usage. In the case of *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, Mr. Justice Gray, speaking for the supreme court, defines the word "cash," used in a criminal statute, as follows:

"The word 'cash,' in this statute, as in common speech, means ready money, or money in hand, either in current coin or other legal tender, or in bank bills, or checks paid and received as money, and does not include promises to pay money in the future."

This, it seems to us, is a sufficient support for our conclusion. Doubtless the weight of authority in the construction of limited partnership statutes is to the contrary; but, as already said, the trend of modern cases is towards a more liberal and sensible view of such statutory requirements. Their purpose is to secure the actual payment of the money into the capital of the firm, and, failing that, to hold the special partner to a general liability. It seems to us that our construction of the statute secures

this end, and it does not entrap the honest and unwary into unexpected liabilities, by enforcing a stricter rule as to what are cash payments than obtains in the commercial community. There is nothing in the decisions of the supreme court of Michigan upon this statute which prevents our giving such a construction to it as we think its language and its policy require. *Rothchild vs. Hoge*, 43 Fed. 97. The judgment of the circuit court is affirmed.

NOTE.—See Mechem's Elements of Partn., § 318.

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## DURANT vs. ABENDROTH.

*Court of Appeals of New York. 1877.*

69 N. Y. 148, 25 Am. Rep. 158.

Action against three defendants, as alleged partners, on two promissory notes. The defendant Abendroth alone defended, claiming that he was liable only as a special partner under the statute of limited partnerships.

The certificate for the formation of a limited partnership was filed in the county clerk's office on the 23d day of December, 1870, and dated that day, and signed and acknowledged by all the defendants. It stated that the partnership was to commence on the 1st day of January, 1871, and that the special partner, Abendroth, "has contributed the sum of ten thousand dollars in cash, as the capital to be used in said business." An affidavit was annexed, sworn to by the two general partners, stating that the sum specified in the certificate, as contributed by the special partner, has been actually and in good faith paid in cash. Abendroth testified that the papers were signed on the 23d of December, 1870, and that he on that day gave his check for the $10,000, dated December 31, 1870, which was paid on presentation, Jauuary 2, 1871. The court directed a verdict for plaintiff, subject to the opinion of the General Term, which gave judgment for the plaintiff, and the defendant Abendroth appealed.

*Samuel Hand*, for defendant.

*Carlisle Norwood, Jr.*, for plaintiff.

RAPALLO, J. (Omitting a portion pertaining to a matter of practice.) The main questions in the case are whether the statement in the certificate of the formation of the limited partnership of Griffith and Wundram, dated and filed on the 23d of December, 1870, that William P. Abendroth, the special partner, had contributed the sum of ten thousand dollars in cash as the capital to be used in the business of the firm, was true, and whether the affidavit of the general partners, sworn to on the same day, that the sum specified in said certificate to have been contributed by the special partner as the capital stock of said firm, had been actually and in good faith paid in cash, is borne out by the facts proved on the trial. A negative answer to either of these questions necessarily leads to an affirmance of the judgment. 1 R. S. 763, § 8.

The certificate and affidavit speak as of the day of their date. They are not promissory, but state what had then been done. Unless therefore the capital had on that day been actually paid in cash, the statements cannot be said to be true. Neither the honest intention of the parties that it should be paid at or before the time appointed for the commencement of the partnership, nor their good faith, manifested by the actual payment in cash at that time, can remedy the defect, if the payment had not been actually made in cash when the certificate and affidavit were made and filed. The statute peremptorily requires an affidavit that the capital has been actually paid in cash, and withholds its protection from the special partner if the affidavit be not true. The object of this provision is to secure certainty, and to prevent equivocal transactions in the formation of these partnerships. Nothing but cash satisfies its requirement. No engagement or security, however good, can be substituted even temporarily, and the affidavit of the actual payment must be filed with the certificate. However honest the intentions of the parties may be, if this affidavit is not absolutely true, the consequences prescribed by the statute must follow, and they cannot be averted by a subsequent payment, nor by the consideration that no injury resulted to any creditor from the affidavit not being true when made.

The payment in this case was made by a check of the special

partner, dated, and therefore payable, on the 31st of December, 1870. This clearly was not cash on the 23d, when it was delivered to the general partners and the affidavit was made. It was a mere obligation or order payable in future. It was in fact paid on presentation on the 2d of January, 1871. This shows that the parties intended no fraud, and the reason for resorting to this form of proceeding is explained by the fact that the partnership was not to commence until the first of January, 1871, which fell on Sunday. Nevertheless it was not the fact that the special partner had actually paid the sum specified in the certificate, in cash on the 23d, when the affidavit was made. He had merely given an order for its payment on the 31st. Although doubtless it was the *bona fide* intention that the check should be paid on the 31st, yet many contingencies might have occurred to prevent its ever being paid.

It is strenuously contended on the part of the appellants that the statute does not require that the capital contributed by the special partner be paid to the general partners before the day fixed for the commencement of the partnership; that where, as in this case, the papers are filed before that day, it is sufficient that the money be deposited in the hands of any third party; that the presumption is that the special partner had the money in bank on the 23d of December, when he drew the check, and that he had placed it there for the purpose of being paid on the 31st to the general partners as his contribution of capital, and therefore the statement that it had been actually paid was true.

If the special partner had paid the money to the bank to the credit of the general partners, or deposited it with any third party for the express purpose of being paid to the firm at the commencement of the partnership, and had appropriated it to that purpose in such manner as to part with all control over it himself, there would be much force in the argument that this was a payment of his contribution of capital. But assuming that he had the money in bank on the 23d, and that he intended that it should be applied to the payment of the check (facts of which there was no evidence), still it was there to the credit of the special partner. It remained his property and subject to his draft and control, notwithstanding the check which he had given.

The check was put in evidence, and was not certified, nor could it have been certified until the 31st. He could have drawn out the money at any time in the interim, or counter-

manded the check. The money might as well have been in his own pocket, and was so in contemplation of law. A person cannot be said to have paid money thus situated. All that can be said is that he had provided it, and intended that it should be paid when the time came; but he had done no act placing it irrevocably beyond his own control.

The capital was in fact paid on the 2d of January; but no affidavit of that payment was filed as required by the statute. The affidavit prematurely made on the 23d could not be made true by that subsequent payment.

The parties have made a careless, though no doubt innocent, mistake; but they have failed to comply with the statute, and the special partner is therefore deprived of its protection. If the court had the power to rectify such a mistake, it would gladly do so in this case; but it does not possess the power.

The judgment must be affirmed.

All concur, except CHURCH, C. J., and EARL, J., dissenting, ALLEN, J., not sitting.

Judgment affirmed.

NOTE.—See Mechem's Elements of Partn., § 818.

See note to this case in 25 Am. Rep. 158.

But compare *President, etc., Manhattan Co. vs. Laimbeer*, 108 N. Y. 578, 15 N. E. 712 referred to in note to following case.

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## HENKEL vs. HEYMAN.

*Supreme Court of Illinois. 1878.*

91 Ill. 96.

Appeal from the Appellate Court of the First District; the Hon. Theodore D. Murphy, presiding Justice, and the Hon. Geo. W. Pleasants and Hon. J. M. Bailey, Justices.

This was an appeal by Henkel from a judgment against him on demurrer in a suit brought by Heyman against Henkel, E. Hartman and S. Hartman to charge them as partners on a bill of exchange. In the lower court Henkel pleaded as a defense the formation of a limited partnership in which he was the special partner, incorporating in his plea in full the various

agreements, certificates, affidavits, etc., which may be found in the report of this case.

We quote only the following:

That on said second day of March, 1877, the said defendants took the said certificate of limited partnership, together with the said acknowledgment and the said certificate of Emanuel Hartman and Simon Hartman that the said sum of $15,000 in money had been paid toward the capital stock of said partnership, and the said affidavit of the said Emanuel Hartman to the truth of the said last mentioned certificate, to the office of the county clerk of Cook county, and there delivered the same to the said county clerk of Cook county, and requested of him that he file and record the same, and paid the said clerk of Cook county his fees therefor.

The following allegation in brackets is the amendment afterward allowed:

[And the said Henkel avers that the said clerk, neglecting his duty in the premises, did not file and record said papers, as required by law, but returned them to the said defendants, after having the charge and custody of the same for a time sufficient to file and record the same, and that said papers were then, on said third day of March, by said defendants taken from the office of said clerk, and thereafter remained in the custody and under the control of the said defendants.]

*Messrs. Monroe, Bisbee & Ball*, for the appellant.

*Mr. Adolph Moses*, for the appellee.

Mr. Justice SCHOLFIELD delivered the opinion of the Court:

The common law did not admit of partnerships with a restricted responsibility, and the statute, therefore, authorizing limited partnerships must be substantially complied with, or those who associate under it will be liable as general partners. *Bowen vs. Argall*, 24 Wend, 496; *Smith vs. Argall*, 6 Hill 479; same again in 3 Denio 435; *Richardson vs. Hogg*, 38 Penn. St. 153; *Andrews vs. Schoot*, 10 Id. 47; *Van Ingen vs. Whitman*, 62 N. Y. 513.

Our statute in relation to "Limited Partnerships" requires that the certificate showing the formation of the partnership, when properly acknowledged, shall be *filed* in the office of the county clerk and recorded at large, etc., and that there shall

also be filed in the same office, at the same time, "an affidavit of one or more of the general partners, stating that the amount in money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually and in good faith contributed and applied to the same." And it is expressly provided that "no such partnership (i. e. limited partnership) shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed as above directed." Rev. Stat. 1874, p. 678, §§ 6, 7, 8.

The averment in this plea comes far short of the requirement of the statute. The statute requires that the certificate, acknowledgment and affidavit shall be *filed*—that is, placed to be kept (13 Vin. Abrid't. 211) in the office of the clerk of the county—and not, as averred, merely temporarily deposited there. Had the certificate, acknowledgment and affidavit been left with the county clerk, with directions to file them, his refusal to comply with the directions would not, doubtless, have affected the rights of the parties. In that case the parties would have done all that they could have done to comply with the law. But here the papers are taken away by the parties themselves. By their own voluntary act they prevent the papers from being on file.

But counsel insist the statute does not require that the certificate, acknowledgment and affidavit shall be kept on file; and that the rules applicable to deeds, etc., filed for record must apply to these documents.

The statute uses no qualifying language in regard to the filing of these papers. It does not say they shall be filed "for record," or "until recorded," but that they *shall be filed;* and the *certificate* so acknowledged and certified shall also be recorded—but the affidavit of the partners is not required to be recorded. See Rev. Stat. 1874, p. 678, §§ 6, 7.

Deeds, mortgages and other instruments relating to or affecting the title to real estate, are required to be recorded, and the statute makes them void as to creditors and subsequent purchasers without notice, until they are *filed for record*, and the record is made evidence of the deed or other instrument in behalf of all persons not having the original in possession. In those cases the sole object of the filing of the instrument is, to enable it to be recorded. After filing and until the recording

the deed or other instrument is, itself, constructive notice; after the recording, the record affords such notice.

As before observed, the language here does not indicate that the filing is to be temporary merely, but permanent. Like the filing of a declaration, and other papers required in practice to be filed, it would seem the papers filed are to become part of the permanent records of the court.

But even if we were prepared to hold that the object of filing is only temporary—to allow the papers to be recorded—it would be impossible, under this plea, to hold that Henkel has done all that the law required him to do, to limit his liability.

It is averred the papers were not filed and recorded, by reason of the neglect of duty by the clerk; but it is also averred that the papers were taken away from the clerk's office by Henkel, and that he has since retained their possession, and it is not averred that he did not know they were not filed and recorded when he took them away. This averment, under an old and familiar rule of pleading, must be taken most strongly against the pleader (1 Chitty's Pleadings, 7 Am. ed. 578); and so we must conclude, when he took the papers away, he knew they were not filed and recorded.

No case cited by counsel goes to the extent of holding that the mere neglect of a clerk to record a paper will justify a party in knowingly taking it away from the office unrecorded, and in dispensing with all further efforts to have it recorded. If he knew the papers were not filed and recorded, he was inexcusable in taking them away from the office in that condition. It was his duty, and the law gave him ample remedy to compel the clerk to file and record the papers.

We think the plea was clearly insufficient and the demurrer to it was properly sustained.

The judgment below is affirmed.

Judgment affirmed.

NOTE.—See Mechem's elements of Partn., § 313.

But see *President, etc., Manhattan Co. vs. Laimbeer*, 108 N. Y. 578, 15 N. E. 712, holding that the default of the clerk in recording papers duly filed with him for record will not prejudice the parties. *Henkel vs. Heyman*, is there commented upon.

## DURGIN, *et al.* vs. COLBURN, *et al.*

*Supreme Court of Massachusetts, 1900.*

176 Mass. 110, 57 N. E. 213.

Action by one Durgin and others against Colburn, Fuller & Co. to recover $459.65 with interest from May 4, 1899, being the balance due upon a promissory note for $3,000 made by the partnership of Colburn, Fuller & Co. The defendants composed the partnership, and claimed that it was a limited one, formed, renewed and conducted in accordance with the laws of the commonwealth, and that Frances E. Colburn was a special partner and not liable for said note. The court found for plaintiffs, and reported the case to the supreme judicial court. Judgment on findings.

*Hurlburt, Jones & Cabot* for plaintiff.

*Johnson, Clapp & Underwood* for defendant.

BARKER, J. One of the questions raised is decisive of the case. Upon the others we express no opinion. When the partnership was renewed, no contribution to its capital was made by the special partner, except that of continuing in the firm her interest in the assets of the expiring partnership. This interest was then substantially less in value than her orignal contribution of $100,000 to the capital of the expiring firm, owing to the impairment of its capital by losses in its business, and without taking into account the amount paid out as interest on the special capital. The certificate of renewal is to the effect that the special partner had contributed the sum of $100,000 in cash to the original limited partnership, and that the sum so contributed is continued by her in the partnership as her contribution of capital upon the renewal. The defendants then believed that her interest in the partnership was of the value of $100,000, but the fact was otherwise, and the case contains no statement of any just ground for this belief.

Limited partnerships are creatures of the statutes. The present case is governed by St. 1887, c. 248, § 3, amending

Pub. St. c. 75, § 7, by adding a new provision as to renewals. Our first enactment as to limited partnerships (St. 1835, c. 48) requires the actual cash payment of a specific sum, as capital, to the common stock by the special partner, and the making, acknowledgment, recording and publication of a certificate stating, among other things, "the amount of capital which each special partner has contributed to the common stock." St. 1835, c. 48, §§ 3, 5. Upon every renewal a certificate thereof was to "be made and acknowledged, recorded and published," in the same manner provided for respecting the original formation of the partnership. St. 1835, c. 48, § 6. The provision made by the section last cited remains substantially unchanged until the enactment of St. 1887, c. 248, § 3. See Rev. St. c. 34, § 6; Gen. St. c. 55, § 6; Pub. St. c. 75, § 7. Up to that time it had never been considered in a case involving the obligations of a special partner in a renewed limited partnership, but had been mentioned merely in *Lancaster vs. Choate*, 5 Allen 530, 538.

The language of Pub. St. c. 75, § 7, was this: "Upon every renewal or continuation of a limited partnership beyond the time originally agreed upon for its termination a certificate of such renewal or continuation shall be made, acknowledged, filed and published in like manner as herein provided for the certificate of its original formation." The statutes of Pennsylvania and of New York had a similar provision, to which was added a declaration that every such partnership otherwise renewed or continued should be deemed a general partnership. Act Pa. March 21, 1836, sec. 11; 1 Rev. St. N. Y. p. 765, § 11. The language of these two provisions is identical, and is this: "Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership." In the year 1885 this provision had been held, in Pennsylvania, to require that when a limited partnership was renewed the special capital must be unimpaired. *Haddock vs. Manufacturing Corp.*, 109 Pa. St. 372, 382, 1 Atl. 174. On the other hand, in March, 1886, a special term of the supreme court of New York, by a decision afterward

sustained, in effect, by the court of appeals, has held that the fact that the special capital had been wholly lost at the time of the renewal did not make the renewal firm a general partnership. *Ropes vs. Colgate*, 17 Abb. N. C. 136; *Bank vs. Colgate*, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712.

Whether or not these contradictory constructions of a statute substantially like our own, then contained in Pub. St. c. 75, sec. 7, were known to the legislature of 1887, when it amended our statute, we are not informed. However this may have been, the amendment then added can have but one meaning. In saying, by St. 1887, c. 248, sec. 3, "No such renewal or continuation shall be made unless the capital contributed by the special partners is equal in amount or more than the aggregate capital the special partners originally contributed," the legislature, by the words "equal in amount," meant equal in value as a resource or asset of partnership. This is the most natural signification of the language of the amendment, which never could have been used to show that the original section was intended to allow a limited partnership to be renewed with special capital impaired or lost, and without a fresh contribution. Money originally contributed as capital of the firm, and then lost in its business, is not thereafter capital of that firm, and cannot be contributed as capital of the renewed firm. If the only contribution then made to capital is the interest of the special partner in the old firm, depreciated in amount by a substantial impairment due to losses in business, it cannot be equal in amount to the original contribution.

The present case is one in which the persons who made the certificate of renewal had good ground for believing that there had been no impairment of the original capital, and we do not decide that if, at the expiration of a limited partnership, the partners believed, with good reason, that the whole capital was intact, and so agreed to and certified a renewal upon that basis, the mere fact that it thereafter turned out that there had been an impairment not then ascertained or ascertainable would make the renewal contrary to the statute. Here the certificate of renewal was made upon the theory that the continuation of the interest of the special partner in the assets of the expiring firm was a contribution to the capital of the new firm equal in amount to that originally contributed. But because the capital

had been substantially impaired by losses in business, and no fresh capital was then contributed, the statute was not complied with, and all the members of the new firm are subject to the liabilities of general partners. St. 1887, c. 248, § 4. Judgment for the plaintiff on the finding.

NOTE.—See Mechem's Elements of Partnership, § 813.

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## JAFFE vs. KRUM.

*Supreme Court of Missouri, 1886.*

88 Mo. 669.

Appeal from St. Louis Court of Appeals. Affirmed.

*Hough, Overall & Judson* for appellant.

*W. B. Douglass, W. H. Scudder, Jr.*, for respondent.

BLACK, J. The agreed facts show that O. M. Jaffe and William Robertson made a limited partnership under the statute of this state, the business to be conducted under the name of William Robertson, Jaffe being the special partner. All the statutory prerequisites were complied with. The special partner thereafter advanced to the firm $15,503.96 as a loan, having previously paid in his entire contribution, as agreed upon in the written partnership agreement. Thereafter the partnership became insolvent, and Robinson, for the firm, made a deed of voluntary assignment. Jaffe, who had his demand allowed by the assignee, now claims to be entitled to share *pro rata* with the other creditors as to his demand arising from the loan. The assignee denied to him this right, and so did the trial court.

The general scope of the statute with respect to limited partnerships is to provide how they may be formed, to exempt the special partner from personal liability for the debts, to deprive him of all power to manage the affairs, and to determine when and under what circumstances he shall be held as a general partner. Section 3409 is as follows: "If the partnership be-

comes insolvent, no special partner shall be paid as a creditor of the firm, or receive the benefit of any lien in his favor as such, until the other creditors of the firm are satisfied." The common law determined the rights and liabilities of partners in general, and that law governs in those limited partnerships where no contrary provision is made by the statute. *Marshall vs. Lambeth*, 7 Rob. (La.) 471; *Ames vs. Downing*, 1 Bradf. 321.

Now, there is no room for doubt as to what the section of the statute above quoted means. In case of insolvency of the partnership it excludes, or rather postpones, the special partner as a creditor until the other creditors are satisfied. Advances made by him to the partnership by way of a loan are clearly within its terms. It cannot be confined in its operation to the advances made by way of contribution to the capital under the articles of partnership. That would render the section wholly useless, for without it there is nothing in the statute which would permit the special partner to share with the other creditors as to his part of the capital invested. The whole scope of the act is to the effect that he subjects that to the hazards of the enterprise. The lawmakers have used emphatic language, and we have nothing to do but abide by their words. Other courts have reached the same conclusion upon statutes in substance the same as the one under consideration. *White vs. Hackett*, 20 N. Y. 179; *Mills vs. Argall*, 6 Paige 577; *Ward vs. Newell*, 42 Barb. 482; *Dunning's Appeal*, 44 Pa. St. 150.

The judgment in this case is affirmed. All concur.

NOTE.—See Mechem's Elements of Partn., 310–316.

## SHARP vs. HUTCHINSON.

*Court of Appeals of New York. 1885.*

100 N. Y. 538, 3 N. E. 500.

*George H. Forster*, for appellant David J. Hutchinson, impleaded, etc.

*Mr. Robertsons*, for respondent, James H. Sharp.

EARL, J. In April, 1880, the defendants attempted to form a limited copartnership for the purpose of carrying on business in the city of New York under the firm name of Hogg & Patterson; the defandant Hutchinson being the special partner. Thereafter the plaintiff sold the firm certain goods, and this action was brought against all members of the firm to recover the price of such goods. The defendant Hutchinson alone defended; setting up as his answer the formation of the limited copartnership, and claiming exemption from liability, under the statute, as a special partner.

The plaintiff in his complaint alleged a cause of action against the defendants as copartners, making no mention of the attempt to form a limited copartnership, and upon the trial he proved the sale of the goods to the firm, and then introduced in evidence the certificate and papers filed for the formation of the limited copartnership, from which it appeared that Hutchinson contributed to the capital of the firm $10,000, and then he offered to prove that he in fact contributed only $8,000. Upon the objection of Hutchinson's counsel, this proof was rejected, upon the sole ground that it was not within the issue. The view of the trial judge was that the complaint, instead of treating Hutchinson as a mere general partner, should have been based upon the statute alleging the special defects in the formation of the limited copartnership.

In this there was error. If the proof had been received, it would have shown that Hutchinson never in fact became a special partner, but that he was from the beginning a general partner, and liable as such. Rev. St., pt. 2, c. 4, tit. 1, sec. 8.

The cause of action against him was not based upon the statute, but upon his common law liability as a general partner; and hence it was proper, in setting forth in the complaint the facts constituting plaintiff's cause of action, to charge him as a general partner, and then, upon the trial, to show that he was such by any competent proof.

The general term was therefore right in reversing the judgment of the special term, and its order should be affirmed, and absolute judgment ordered for the plaintiff, with costs.

All concur.

NOTE.—See Mechem's Elements of Partn., §§ 310-316.

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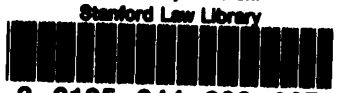

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